United States Court of Appeals

for the Second Circuit

APPENDIX

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74-2281

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

PENT-R-BOOKS, INC.,
Defendant-Appellant.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

CONSOLIDATED JOINT APPENDIX.

Volume I—Pages 1a to 580a.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

(7590)

UNITED STATES COURT OF APPEALS
FILED
NOV 10 1975
H. DANIEL RUSSO, CLERK
SECOND CIRCUIT

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UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 69C 1362.

DOCKET ENTRIES.

69C 1362 DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
10/31/69	COMPLAINT FILED. SUMMONS ISSUED.	1
11-19-69	Summons returned and filed. Deft srvd on 11/17/69.	2
6-26-70	BY DOOLING J - ORDER ON STIP FILED, It is stipulated and agreed by and between the attorneys for the parties hereto that the time to move or answer with regard to the Complaint herein by and it hereby is extended up yo and including June 30, 1970. (P/C mailed to Attys) ~~7/7~~	
7-1-70	Before DOOLING, J.-Case called-Pre-trial held and concluded.	3
7/2/70	ANSWER of deft. filed. (Served 7/1/70)	
11-12-71	Before DOOLING, J.- Case called - Pre-trial conference held and concluded.	
11/17/71	By Dooling, J.-Conference memo & order directing that Mr. Levy & Asst. US Atty submit draft decrees, etc., as indicated, filed. (Filed in 69C1290)	
9-8-73	Notice of motion and memorandum of law granting summary judgment in favor of pltff ret 9-26-73 at 4:30 P.M. filed.	5/6
9-8-73	Pltff's statement pursuant to local rule 9(g) filed.	7
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	8/9
7-8-74	By DDOLING, J. - Memorandum and order dtd. 7-3-74 granting Government's motion for summary judgment & denying cross-motion of deft for summary judgment etc. filed. (p/s to attys)	10
7/16/74	Letter dated July 13, 1974 filed from H. Levy to J. Dooling	11
7-16-74	By DOOLING, J. - Supplemental memorandum and order dtd 7-16-74 re corrections filed.	12
7/18/74	Judgment dated July 17, 1974 filed that the deft is commanded to cease and desist from any further mailings to L. Ireland, to delete the anme of said addressee from all mailing lists owned or controlled by deft, etc. P. C . mailed to the attys.	13 JSG
9-12-74	Notice of appeal filed. Duplicate mailed to C of A. pltff. in	14

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

COMPLAINT

Civil Action No.

69C 1362

- X

Plaintiff, UNITED STATES OF AMERICA, by its attorney, EDWARD R. NEALER, United States Attorney for the Eastern District of New York, for its complaint, upon information and belief, alleges as follows:

FIRST: That plaintiff is a corporate sovereign and body politic.

SECOND: That this Court has jurisdiction of this action pursuant to the provisions of Title 39 United States Code, Section 4009 (Public Law 90-206 Section 301) and Title 28 United States Code, Section 1345.

THIRD: That defendant is a New York corporation having an office or represented by duly authorized officers or agents in the City of New York at 203 Kings Highway, Brooklyn, New York.

FOURTH: On or about March 8, 1969, defendant mailed or caused to be mailed through the United States mail to L. Ireland of Bloomfield, New Jersey (hereinafter

referred to as "addressee"), material [illegible] for sale a publication entitled The Pictographic Manual of Sexual Intercourse (hereinafter referred to as the "advertisement" or "advertisements").

FIFTH: That the above-described mailing consisted of pandering advertisements which the addressee believes to be erotically arousing or sexually provocative.

SIXTH: That the addressee requested the Postmaster General to issue an order directing defendant, its agents and assigns, to refrain from further mailings of such material to him.

SEVENTH: That upon receipt of this request and pursuant to Title 39 United States Code, Section 4009, on March 20, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 5776, which ordered and directed defendant, its agents and assigns to refrain from any further mailings to the addressee, to delete his name from any sales or transactions involving lists bearing his name, effective thirty (30) days after receipt of this order. A true copy of the order is attached as Exhibit A hereto and made a part hereof.

EIGHTH: A copy of the order was mailed to defendant by registered United States mail on or about the date it bears.

COMPLAINT

NINTH: Thereafter the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

TENTH: On or about May 6, 1969, in violation of Prohibitory Order No. 5776, defendant, or someone acting on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph fourth of this complaint.

ELEVENTH: On June 6, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant or someone acting in its behalf had violated Prohibitory Order No. 5776, and advising defendant that any response or request for hearing had to be filed within fifteen (15) days. A true copy of said Complaint is attached as Exhibit B hereto and made a part hereof.

TWELFTH: A copy of the Complaint was mailed to defendant by registered United States mail on or about the date it bears.

THIRTEENTH: Defendant did not request a hearing or otherwise respond to the Complaint.

FOURTEENTH: On July 14, 1969, a determination was made that defendant or someone acting in its behalf had violated Prohibitory Order No. 5776. A copy of said determination is attached as Exhibit C hereto and made a part hereof.

COMPLAINT

FIFTEENTH: A copy of the determination was mailed to defendant by registered United States mail on or about the date it bears.

SIXTEENTH: The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of 39 United States Code, Section 4009, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, United States of America, prays:

A. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 5770, and more specifically, that this Court order and direct defendant, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee herein, to immediately delete the name of said addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

COMPLAINT

8. That this Court grant to plaintiff such other and further relief as may be just and proper.

EDWARD R. NEAHER
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By: Ralph A. Bontempo
RALPH A. BONTEMPO
Assistant U. S. Attorney

EXHIBIT A, ANNEXED TO COMPLAINT.

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

Matter to
[illegible] 0.13 Inc
Mailed
P O BOX 1555
NEW YORK NY 10017
and agents or assigns

PROHIBITORY ORDER
NO. 526 5776

WHEREAS we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

L Ireland A DB114
(Name of Addressee)

3 Mill St Bloomfield NJ 07003
(Address);

and

WHEREAS said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39 U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

L Ireland

ADDRESS: 3 Mill St
(Street)

Bloomfield	NJ	07003
(City)	*(State)*	*(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

DATE

MAR 3

FOR JOSEPH J. [illegible] Postmaster

[illegible] City State ZIP Code

POD Form 2152
May 1968

EXHIBIT B, ANNEXED TO COMPLAINT.

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 5776
Issued Against

PLNT-R-BOOKS INC

BOX 1555

NEW YORK NY 10017
and agents or assigns.

On behalf of:

Mr. L. R. Ireland
Complaining Addressee

P. O. Docket No. NK-69-5776-107

On the 21st day of March, 19 69, you received Prohibitory Order No. 5776, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, [illegible] (Address)

[illegible], within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] NEWARK, N.J. JUN 6 1969 USPO

Dated:

J Keeler
FOR JOSEPH P. [illegible] Postmaster
NEWARK NEW JERSEY 07114
City State ZIP Code

POD Form 2153
May 1968

EXHIBIT C, ANNEXED TO COMPLAINT.

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of Prohibitory Order No. 5776
Issued Against
PENT-R-BOOKS INC
BOX 1555
NEW YORK NY 10017

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. NY-69-5776-107

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

J. Kelly
Postmaster

City State ZIP Code

[POSTMARK] NEWARK, N.J. JUL 14 1969 USPO

Dated:

POD Form 2154
May 1968

Exhibit C

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,	:	NOTICE OF MOTION
Plaintiff,	:	69 C 1362
- against -	:	
PENT-R-BOOKS, INC.,	:	
Defendant.	:	

- X

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 26th day of September, 1973, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment to the

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 7, 1973

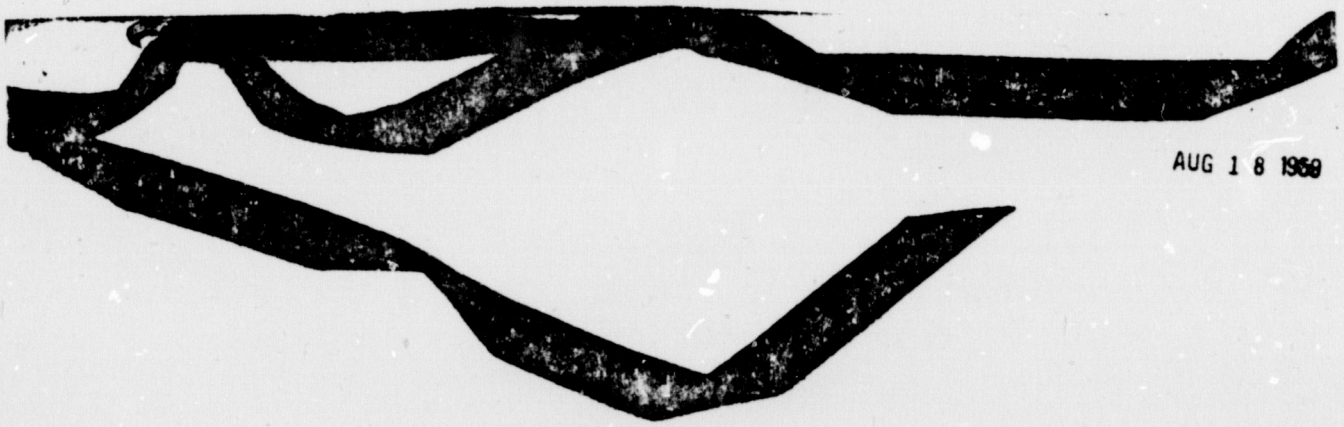
ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By:

LLOYD H. BAKER
Assistant U. S. Attorney

TO:
HERBERT MONTE LEVY, ESQ.
295 Madison Avenue
New York, New York 10017

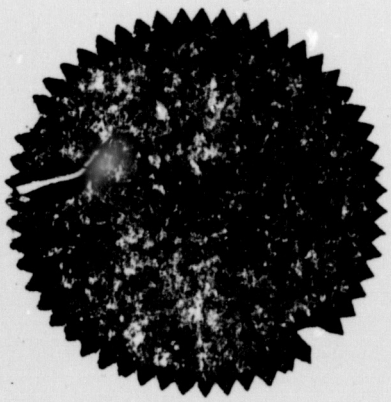
CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.



POST OFFICE DEPARTMENT

Washington, D.C. 20260

I certify that the attached papers are true copies.



IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused the SEAL of the POST OFFICE DEPARTMENT to be affixed the day and year above written, in the District of Columbia.

W. F. Lawrence

WILLIAM F. LAWRENCE
Assistant General Counsel

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
ORDER

In the Matter of Violation of
Prohibitory Order No. 5776
Issued Against
[redacted]

[redacted]

[redacted]

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. [redacted]-69-5776-107

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

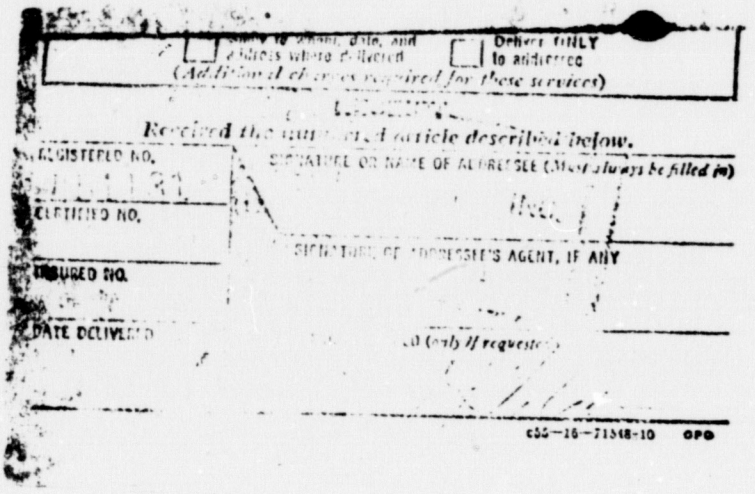
J. Keeley
Postmaster [redacted]
FOR JOSEPH J. BENUCCI
NEWARK NEW JERSEY [redacted]
City State ZIP Code

[POSTMARK] NEWARK, N.J. JUL 14 1969 USPO

Dated:

PSD Form 2154
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



Deliver ONLY to addressee

(Additional charges required for these services)

Received the registered article described below.

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

(Only if requested)

c55—16—71548-10 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of Prohibitory Order No. 5776
Issued Against

[redacted]

[redacted]

[redacted]

and agents or assigns.

On behalf of:

[redacted]
Complaining Addressee

P. O. Docket No. [redacted]

On the [redacted] day of [redacted], 19 69, you received Prohibitory Order No. 5776, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, [redacted] (Address), [redacted], within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

NEWARK, N.J. JUN 6 1969 USPO

[POSTMARK]

Dated: [redacted]

J Kelly

FOR JOSEPH J. [redacted], Postmaster

NEWARK NEW JERSEY [redacted]

City State ZIP Code

[redacted] 2153
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

P. O. BOX 81
BROOKLYN, N. Y. 11223

FIRST CLASS MAIL

80

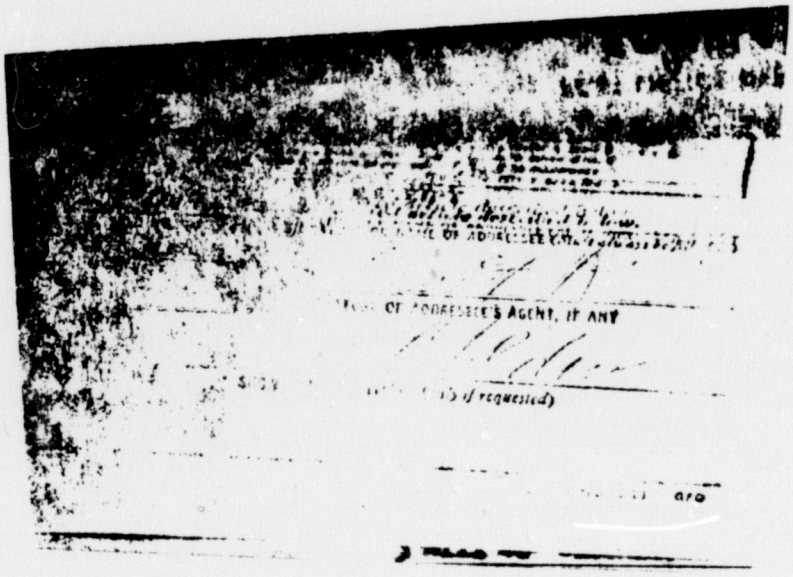
BROOKLYN N. Y.

FIRST CLASS
U. S. POSTAGE
PAID
6c
Permit # 9546

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

[redacted] Mailer

P O BOX 1555

NEW YORK NY 10017

and agents or assigns

PROHIBITORY ORDER

NO. [redacted] 5776

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

L Ireland A BB114

(Name of Addressee)

3 Mill St Bloomfield NJ 07003

(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

L Ireland

ADDRESS: 3 Mill St
(Street)

Bloomfield NJ 07003
(City) *(State)* *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

MAR 29 1969

Dated:

POD Form 2152
May 1968

[redacted]

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

USE THIS FORM

I, L. IRELAND, recipient of the enclosed mailing from PENT-R Books, Inc., P.O. Box 1555 Grand Central Station, New York, N.Y. 10017

consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, § 4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me, [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

[redacted] Mar. 8, 1969
Signature Date

[redacted] Hill St.
Street

Bloomfield, N.J. 07003
City, State, ZIP Code

LIST CHILDREN AND BIRTHDATES:

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

PENT-R
BOOKS INC.
P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

IRELAND L.5776

BROOKLYN N. Y.

FIRST CLASS U.S. POSTAGE PAID Permit #9146

5776

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED [illegible] CHURE offering for sale to Adults Only, a new [illegible] you do not wish this mail or if you are not over the age of [illegible] DO NOT OPEN THIS ENVELOPE! Simply mark the [illegible] "REFUSED", sign your initials and return it to your [illegible] the return of this envelope, we will endeavor to remove your [illegible] from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

...is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"Wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"Only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in Chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"Expect to be married in a few months. We feel that this book has set us off to a good start in sexual matters. Thanks very much." R. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

TABLE OF CONTENTS

...final chapter just complete a few short weeks ago, THE ...OGRAPHIC MANUAL OF SEXUAL INTERCOURSE is ...est, most up-to-date sex manual on the market. It is the sex ...ay which is presented to you; this is no compilation of ... wisdom. People change, even the techniques of sex ... This is today's guide to sexual intercourse written for ... people! We ask you to review the table of contents:

I ..... History of Sex
II ..... Dimensions of Sex
III ..... Philosophy of Sex
IV .....You and Sex
V ..... Male and Female Sex Organs
VI ..... Art of Love Making
VII .....Positions for Sexual Intercourse
VIII ..... Female Oral-Anal Sexuality
IX ..... Male Oral-Anal Sexuality
X ..... Female Technique for Satisfying the Male
XI ..... Male Technique for Satisfying the Female
XII ..... Sexual Intercourse During Menstration and Pregnancy
XIII .....Satisfying Substitutes
XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
XV ..... Compiling Your Own Handbook

...e to suggest that no three books taken as one, offer the ...coverage of this single volume. The above table of ...nt suggests the scope of what is offered. Each chapter ... of clarity, of down-to-earth language which takes you ...o the heart of the matter. This book was not written ...professional, although we fully expect that many ...ls will insist upon having a copy of this book in a ...position on their bookshelves.

...are considering marriage will want a copy of this ...se who are married and are just beginning to find a ...um in their connubial bed will want to seek here for ...rs to their problem. Those who are ill, old, or ...d will realize that their sex life need not be the ...strating problem it now seems to be.

...have feelings which you think are unnatural, even ...ful your sex nature cries out for fulfillment. Which ...pu- turn? What can you do? You can read this book ...answer.

...confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill our and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION ORDER

When it is published, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE ONLY $9.98 SPECIAL PRE-PUBLICATION ORDER

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE.

PENT-R BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

☞ .....
signature

Print Name. ..... Age. .....

Address. .....

City. ..... State. ..... Zip. .....

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

----------x

NOTICE OF CROSS MOTION.

Docket No.
69 C 1362

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

Herbert Monte Levy

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 69 C 1362

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

AFFIDAVIT OF HERBERT MONTE LEVY

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any

order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the

Postmaster General. The determination here, such as it was, was made by a Director of Administrative Services . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, th.t while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is

violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under

the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations

are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

This case should also be dismissed for lack of prosecution, pursuant to Rule 41(b). It was commenced in 1969. An answer was duly filed and served by me. However, there was no activity in this case whatsoever until 1971, when a pretrial conference was held, and an order entered directing the parties to attempt to settle. Immediately thereafter, I began settlement negotiations with Lloyd Baker, Esq., Assistant United States Attorney in charge of this case, and we reached a satisfactory settlement agreement, subject to approval by his superiors in Washington.

Naturally, we agreed that no proceedings would be had in this case unless and until settlement negotiations had fallen through. However, the Government took a completely inordinate amount of time as to settlement. Thus, it was not until October 2, 1973 that the Government in Washington finally turned down my settlement proposals, reciting that it would "settle" only by the entry of consent judgments -- which is no settlement at all, but a requirement of unconditional surrender. Thus, the Government has been responsible for a delay from 1969 to 1973, or some 4 years. True, settlement negotiations would normally not be counted in determining whether there had been a fatal lack of prosecution, but under the circumstances, where it took 2 years for the Government to make up its mind that it finally rejected any and all settlement proposals, after 2 years of complete inactivity, we submit that this total disinterest in the case amounts to lack of prosecution, clearly shows lack of prosecution, and that the case should accordingly be dismissed.

Though the notice of motion recites that it is proceeding upon an annexed certified copy of the record of the proceedings in the Post Office Department, there is absolutely no copy of any certification whatsoever annexed to the papers that have been served upon defendant. Since no affidavit of any sort has been

submitted with the Government's moving papers, there is thus simply no factual basis whatsoever upon which this Court can imply or find any fact whatsoever upon which to base the injunction that the Government seeks. Accordingly, this proceeding must be dismissed. However, on the bare possibility that there is a certification in existence and that an inadvertent clerical error resulted in no copy of the certification being served with the motion papers (though this is unlikely, in view of the fact that amongst the numerous cases in which summary judgment papers were served upon defendant, there is frequently an absence of such certification), we nonetheless go on to note the following, in regard to the merits of the Government's application.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General. It was not even issued by a local postmaster. It was issued, on the contrary, by the Director of Administrative Services.

We are not aware of any delegation to such an officer of the power to issue a prohibitory order, and if there was any such delegation of authority, pursuant to any rule or regulation, we are aware of no statute which would authorize such delegation to the Director of Administrative Services.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of L Ireland . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, L R Ireland , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the

right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, it is quite clear that the presumption does not operate, since, according the Government the benefit of every doubt and assuming for purposes of this argument solely that the evidence is admissible, the most that the Government alleged file shows is that the prohibitory order was received by defendant on March 21, 1969 and that the second alleged mailing was received by the addressee on May 6, 1969 -- being a difference of less than 60 days between such two dates. Thus, the presumption cannot operate, and in the absence of any proof whatsoever other than that to be gained by the use of the presumption,

it is quite clear that the Government has not made out a violation of the prohibitory order, and that summary judgment should be granted to the defendant, dismissing the complaint.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

AFFIDAVIT OF HERBERT MONTE LEVY

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

AFFIDAVIT OF HERBERT MONTE LEVY

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so

as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

AFFIDAVIT OF HERBERT MONTE LEVY

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally

decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause

of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of

highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The proof of date of receipt of the second alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply no signature to even vouch for such a date of receipt -- even by the Post Office.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, neither the complaint nor the order were issued even by a local Postmaster, but were issued by the Director of Administrative Services.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Bloomfield, N.J. , the address to which the first mailing was made, but out of Newark, New Jersey . We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government

AFFIDAVIT OF HERBERT MONTE LEVY

on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

HERBERT MONTE LEVY

GILSON SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

STATEMENT BY THELMA MOSER ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary.

PLEASE SIGN AND RETURN THE STATEMENT BELOW:

ON August 27, 1969, I, Thelma Moser, received from the Pent R Book a second letter.

Thelma Moser
Signature

MINUTES OF HEARING DATED OCTOBER 16, 1970, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

- -x

In the Matter of Violation of Prohibitory Order No. 633, issued

-against-

PENT - R BOOKS, INC.,

Respondent,

on behalf of THELMA L. MOSER,

Complaining Addressee,

-by-

POSTMASTER, Phoenix, Arizona,

Complainant.

- - - - - - - - - - - - - - - - - - - -x

P.O. Docket No. R14-PA64-633

General Post Office
Eighth Avenue & 33rd Street
New York, New York

October 16, 1970
12:24 p.m.

BEFORE:

DAVID S. KELSON.

APPEARANCES:

SCHWARTZ, SCHINDLER & LEVY, ESQS.,
Attorneys for Respondent,
295 Madison Avenue,
New York, New York,
BY: GARY LANGER, ESQ., of Counsel.

MINUTES OF HEARING

P R O C E E D I N G S

Mr. KELSON: This is in the matter of the violation of Prohibitory Order No. 633, issued against Pent - R Books, Inc., Box 1555, Grand Central Station, New York, New York 10017, Post Office Docket No. R14-PA64-633, on behalf of Thelma L. Moser, complaining addressee, by Postmaster, Phoenix, Arizona.

The government's file is admitted into evidence by agreement, subject to any objections that counsel may have at this time.

Your comments, Mr. Langer?

MR. LANGER: First, I would like to comment that, once again, I was unable to discover our file for this particular matter, but I will proceed cautiously.

In addition to the objections contained in the demand for a hearing and in those that will be contained in the generic affidavits that are to be submitted, and in supplementation thereof, I note the following objections:

I note that the prohibitory order and the complaint were issued by a Director of Administrative Services and not by a Postmaster, and this officer did not have the statutory authority to issue these documents, and this proceeding therefore must fall as being improperly instituted.

I note that the first mailing was to a Miss Thelma L. Moser, and that the notice for a prohibitory order is

signed not by Miss Thelma L. Moser, but by Mrs. Thelma L. Moser.

Mrs. Thelma L. Moser does not have authority under the statute or otherwise to issue or request a prohibitory order for Miss Thelma L. Moser. In fact, the notice for a prohibitory order is improperly made out because it indicates that the addressee was Mrs. Thelma L. Moser, when, in fact, that is not so.

The second mailing was to Thelma L. Moser, and without further consideration we are unable to determine whether or not this particular Thelma L. Moser was Mrs. or Miss, and therefore there is no way to determine if the prohibitory order has been violated.

In any event, the prohibitory order was issued without proper authority in behalf of Mrs. Thelma L. Moser.

I would like to look at the original folder on this.

MR. KELSON: You may examine it (handing documents to Mr. Langer).

MR. LANGER: I think that there is a serious question raised by this file. There is a card here which reads as follows:

"In order to make a case against this firm, we must have signed statement as to date of delivery of the second letter. The date given is an estimated

date, but will give us a correct waiting period to carry on this complaint.

"An envelope is supplied for your convenience and no postage is necessary. Please sign and return the statement below:

"On August 27th, 1969, I, Thelma Moser, received from the Pent - R Books a second letter" --

Then there is a signature line, and under the line it says "Signature," and over that line someone has signed "Thelma Moser."

I will assume for the moment that it was Thelma Moser, but it indicates that there is no way to determine what date the mailing was received and, in fact, the Post Office suggested a date and picked a date which was sufficient to show a violation of a prohibitory order.

MR. KELSON: I would have to take issue at this time and make serious comment that any comment by counsel saying the Post Office Department suggested and picked a date -- I think it is highly improper to so state.

The Post Office Department sent a form or a typewritten document to Miss Moser to sign, or to Mrs. Moser, to set forth the date upon which she received a second mailing, if, in fact, it was a second mailing, and,if so, in violation of the law, and I believe that any comment about the Post Office Department picking a date is very improper.

MR. LANGER: I think this document speaks for itself. The date is typed in.

MR. KELSON: I disagree. A date is put in there, and the date may be a date that she stated to them, verbally or otherwise, as being the date that she received it.

And to say that the Post Office Department suggested or picked a date, again, I find to be highly improper.

MR. LANGER: The Post Office says in the document that:

"The date given is an estimated date, but will give us the correct waiting period to carry on this complaint."

MR. KELSON: The date given is an estimated date, as stated in there, does not reflect any date. It doesn't state that that is the date on August 27th. The woman signs a statement on August 27th saying that she received a second mailing.

This is her statement, her signature, as being the date that she says she received it, and to cast any aspersions upon anybody in the Post Office Department insofar as dreaming up a date, certainly, in view of the hundreds of prohibitory orders that have been sent out -- hundreds of thousands, as you say -- and the hundreds of complaints that we have evidencing second mailings, I think, again, is highly improper

to indicate that the Post Office Department just dreamed up a date and fixed up a date in order to come up with a proper thirty-day period.

There is a pattern that has been set in the hundreds of cases that we have had in this office alone of the failure on the part of your client to delete names from a list, be it signed by a director, a postmaster or anybody else.

There is a complete history and pattern of second mailings well beyond the thirty-day time period.

MR. LANGER: In the first place, no pattern has been established, because, as I understand it, no decisions have been rendered.

MR. KELSON: It is quite clear that there have been hundreds of second mailings, as our files indicate, beyond a thirty-day time period, and I don't think that this can be disputed.

MR. LANGER: That is being disputed in all of these hearings. That is what we are here for.

MR. KELSON: We have statements by recipients indicating dates of receipt, hundreds of then.

MR. LANGER: I am not trying to impune the reputation of the Post Office. I merely state that a document in this particular folder raises a serious question as to whether the date of receipt is the date represented by

Thelma Moser or is the date inserted by the Post Office, and the document here is typed in its entirety by the Post Office.

The only thing on that document which is Thelma Moser's is her signature.

MR. KELSON: And her signature is evidence, I think, of the fact that she is stating the date upon which she received it as opposed to being a date dreamed up by some Post Office employee.

MR. LANGER: The date is an estimated date, and clearly an estimated date, and it says so.

MR. KELSON: That is not what she is signing. She is signing as having received it on a date. The statement she signed reads:

"On August 27th, 1969, I, Thelma Moser, received from the Pent - R Books a second letter."

She is stating, whoever signed that, Thelma Moser, that she, on a certain date, received from Pent-R a second mailing. This is the only way I can read it.

MR. LANGER: That's what she is stating, but the government says they supplied an estimated date and she has signed it.

MR. KELSON: She is setting forth an exact date here, as I read it.

MR. LANGER: All of what you say may be so, but

what I say is that we have a serious question which requires further examination. We must examine Thelma Moser and the person who prepared this card.

MR. KELSON: Once again, I take strong issue with counsel's comment, in effect, stating that the Post Office dreamed up a date or just picked at a date to establish a second mailing beyond the thirty-day time period.

MR. LANGER: That's what they say in the card.

MR. KELSON: That is not what they say.

MR. LANGER: It is my interpretation of what they say. They have estimated it and they made sure they estimated a date which is sufficient so they can carry on the complaint.

MR. KELSON: We are just repeating back and forth, but she does specifically state a date upon which she received a second mailing.

MR. LANGER: I have no further comments on this one.

MR. KELSON: Your comments and objections are noted and decision is reserved in this matter, and this matter concluded at 12:35.

(Whereupon, at 12:35 p.m., the hearing in the above-entitled matter was concluded.)

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
69 C 1362

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of

the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of

violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and

process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to

be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost

all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation

rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various

businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the

rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

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*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

AFFIDAVIT OF RICHARD S. SCHWARTZ

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list

without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the

following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

this succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by

computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy.

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* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

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Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast

expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

AFFIDAVIT OF RICHARD S. SCHWARTZ

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above,

AFFIDAVIT OF RICHARD S. SCHWARTZ

we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

WHEREFORE, deponent prays that the plaintiff's motion for a summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 34[illegible]473
Qualified in Kings County
Commission Expires March 30, 19 75

ABOUT YOUR SUBSCRIPTION

Your subscription to Popular Photography is maintained on one of the world's most modern, efficient computer systems, and if you're like 99% of our subscribers, you will never have any reason to complain about your subscription service.

We have found that when complaints do arise, the majority of them occur because people have written their names or addresses differently at different times. For example, if your subscription were listed under "William Jones, Cedar Lane, Midtown, Arizona," and you were to write it as "Bill Jones, Cedar Lane, Midtown, Arizona," our computer would think that two separate subscriptions were involved, and it would start sending you two copies of Popular Photography each month. Other examples of combinations of names that would confuse the computer would include John Henry Smith and Henry Smith; and Mrs. Joseph Jones and Mary Jones. Minor differences in addresses can also lead to difficulties. For example, to the computer, 100 Second St. is not the same as 100 2nd St.

So, please, when you write us about your subscription, be sure to enclose the mailing label from the cover of the magazine—or else copy your name and address exactly as they appear on the mailing label. This will greatly reduce any chance of error, and we will be able to service your request much more quickly.

[illegible] Popular Photography [illegible]

[illegible] SOME IMPORTANT [illegible]

[illegible] Loose Leaf

[illegible] F/[illegible]
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Orders for $10.00 or more shipped postpaid in U.S.A. & Canada. Add 10% for overseas delivery (except APO/FPO). These manuals are also available from your favorite photo dealer or bookstore.

[illegible] *page 14* in convention here that Kodak is [illegible] marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Keller said company is working hard to make nontoxic chemicals and cut level of BOD5. He said Kodak has managed to formulate Ektaprint C stabilizer without [illegible] potential pollutant.

NEW YORK—*Our man Rothschild to speak at communications [illegible]* panelists at 15th annual Wilson [illegible] International Conference on Communication Arts (formerly Miami Conference) [illegible] *Popular Photography*'s senior [illegible] man Rothschild. Other [illegible] meeting, slated for April 2-[illegible] ami, Coral Gables, Fla., include [illegible] Grosvenor, editor and vice president of *National Geographic*; Erich Hartmann of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur [illegible] Burton McNeely, underwater photographer; John Schaefer, free-lance photographer; Larry Schiller, film maker; Paul [illegible] photographer from Holland; Martin [illegible] manager of design and media for [illegible] Co.; Marcello Roblaza, official photographer to the president of the Philippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and Jay Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack.

SUPPLEMENTAL AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Docket No.69 C 1362

Plaintiff,

SUPPLEMENTAL AFFIDAVIT

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for defendant herein. I am fully and personally familiar with the facts set forth below. This supplemental affidavit is being submitted in opposition to the Government's motion for summary judgment, and in support of defendant's cross motion for summary judgment, with the permission of the Court.

SUPPLEMENTAL AFFIDAVIT OF HERBERT MONTE LEVY

All of defendant's papers in this matter were served and filed on November 9, 1973. Thereafter, on November 20, 1973, my client and I observed an advertisement of the United States Postal Service in the New York Times of that day at page 24, and at page 14 of the day's New York Post. That advertisement is being filed together with this affidavit in U. S. v. Pent-R, 69 C 1362. The advertisement is quite material to the issues involved here.

The advertisement is headed, in extremely large heavy black print, with a question being asked the Postmaster of Manhattan and Bronx, New York:

> "This letter took four days to go from Queens to Manhattan. How come?"

Thereafter, the advertisement seeks to explain "How a letter can go wrong", noting that:

> "With all the mail in this town, sometimes mistakes are made.
>
> "Our high-speed machines, for example, sort thousands of letters an hour. But if someone touches the wrong button, in the blink of an eye, a letter can go all the way across country, instead of just across town."

The most significant part of the advertisement recites that "We deliver about 16 million pieces of mail every

day in New York. But even if we could cut the mistakes to 1%, that is still 160,000 late letters. And a lot of New Yorkers steaming." (Emphasis supplied).

Thus, the Postal Service notes that its percentage of mistakes, at least in the New York City area, is higher than 1%. As we note in our moving papers, the maximum possible mistake rate of Pent-R is 0.003%. Even were the Postal Service's error rate just 1%, its errors have been committed, in the delivery of mail, at a rate exceeding 333 times Pent-R's error rate. This reinforces our belief that Pent-R's compliance record is outstanding. It further almost forces us to observe that any injunctive order against Pent-R would be as useless as an injunctive order requiring the Postal Service to improve its record, of compliance with its statutory mandate to deliver the mail, to Pent-R's present degree of compliance.

Pent-R, through computer systemization, has done more to comply with the law than is humanly possible, and more than the law requires. We submit that no injunction should issue.

SUPPLEMENTAL AFFIDAVIT OF HERBERT MONTE LEVY

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, and that the defendant be granted summary judgment, or, alternatively, the other relief requested in the brief and notice of motion.

Herbert Monte Levy

HERBERT MONTE LEVY

Sworn to before me this
20th day of December, 1973.

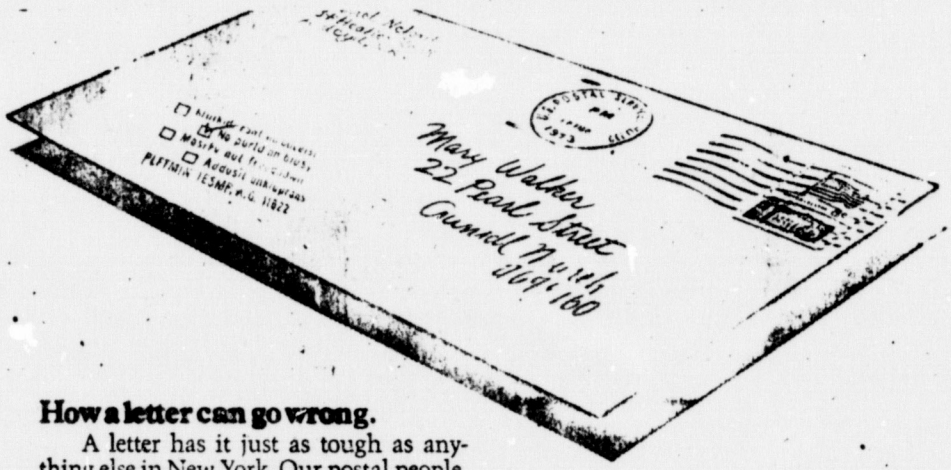
GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19..75

EXHIBIT, ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF HERBERT MONTE LEVY

The New York Times, Tuesday, November 20, 1973

"This letter took four days to go from Queens to Manhattan. How come?"

—Postmaster John Strachan, Manhattan/Bronx,
New York wants you to have the answers.



How a letter can go wrong.

A letter has it just as tough as anything else in New York. Our postal people handle millions of packages and letters every day. And with all the mail in this town, sometimes mistakes are made.

Our high-speed machines, for example, sort thousands of letters an hour. But if someone touches the wrong button, in the blink of an eye, a letter can go all the way across country instead of just across town.

Then too, sometimes we push the right button when the letter has the wrong Zip Code. Same thing happens. The letter takes off for the wrong city, before we can get it going right.

By far and away most mail gets to you on time.

We deliver about 16 million pieces of mail every day in New York. But even if we could cut the mistakes to 1%, that's still 160,000 late letters. And a lot of New Yorkers steaming.

Thanks to the skill of our local postal people...most always your mail gets to you on time. If you're like most people, you rarely give it a second thought. But when a letter does get to you late, no one is more embarrassed than us.

What you can do.

It's a big help if you write legibly. It can be mighty tough figuring out one person's A's and E's from another person's O's and L's. And use the right Zip Code.

Another thing is to mail before the last mail pickup of the day. Your letter can get where it's going a whole day faster that way.

And tell us if something goes wrong with your mail. All of us at the New York Post Office want you to have good mail service.

And we're trying our best to deliver it, 16 million times a day.

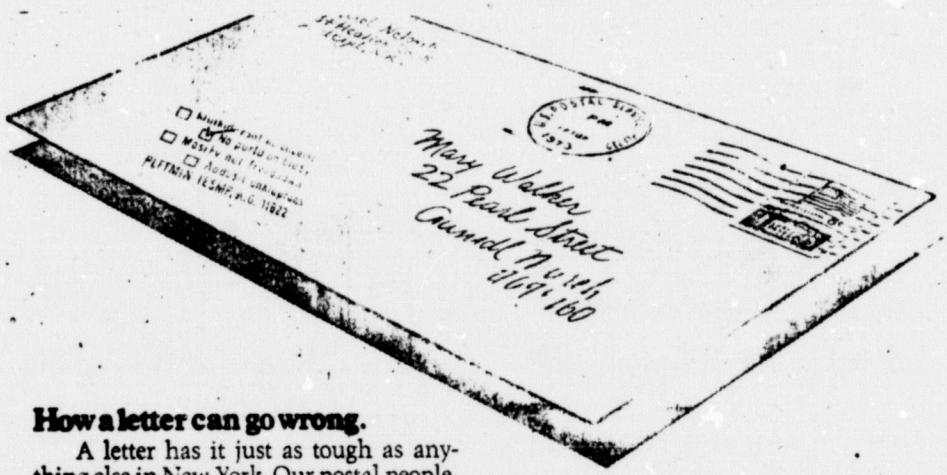
You have questions.
We want you to have the answers.

EXHIBIT, ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF HERBERT MONTE LEVY

New York Post, Tuesday, November 20, 1973

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Another thing is to mail before the last mail pickup of the day. Your letter can get where it's going a whole day faster that way.

And tell us if something goes wrong with your mail. All of us at the New York Post Office want you to have good mail service.

And we're trying our best to deliver it, 16 million times a day.

You have questions.
We want you to have the answers.

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

: 69 C 1362
(IRELAND)

-against-

: MEMORANDUM
and
ORDER

PENT-R-BOOKS, INC.,

:

Defendant.

- X

Appearances:

LLOYD H. BAKER, Esq., (DAVID G. TRAGER, Esq. United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for Defendant

DOOLING, D.J.

The Government moves for summary judgment requiring defendant to comply with Post Office Department Prohibitory Order No. 5776 issued pursuant to 39 U.S.C. § 4009 on July 14, 1969. Plaintiff moved on the certified copy of the Post Office Department record without more.

The Government's case, based on the administrative record, is the following:

Defendant mailed from Brooklyn to one L. Ireland an advertisement for "The Photographic Manual of Sexual Intercourse." There was prominently printed on the envelope a

statement as follows:

"NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED," sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank you."

The recipient, L. Ireland, on a printed form supplied by the Post Office Department signed under date of March 8, 1969, a statement that the recipient considered the mailing "to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter" and requested that the mailer, PENT-R-Books, Inc., be directed "to refrain from making any further mailings to me." Having received notice that an addressee had received the kind of mail matter described in Section 4009(a) and a request for an order, the Newark, New Jersey Post Office sent to defendant at its address as given on the envelope addressed to L. Ireland a Prohibitory Order: the Order recited that the addressee had

determined that the advertisement was a pandering advertisement etc. and had requested the issuance of an order under Section 4009; the Order, as provided in Section 4009(c), directed defendant (a) to refrain from any further mailings to L. Ireland at 3 Mill Street, Bloomfield, N. J. 07003, (b) immediately to delete L. Ireland from all the mailing lists that defendant owned or controlled, and (c) to abstain from selling, renting, exchanging or otherwise making transactions involving mailing lists bearing the name of L. Ireland. The administrative record shows that defendant admitted receiving the prohibitory order.

More than thirty but less than sixty days after the date of the Prohibitory Order, defendant sent a further communication addressed to L.R. Ireland, 3 Mill Street, Bloomfield, N.J. 07003; the envelope bore a notice to the addressee like that of defendant's earlier mailing, asserting that the envelope contained an illustrated brochure offering a new marriage manual for sale. Under date of June 6, 1969, the Newark Post Office sent to defendant at its address as shown on the previous envelopes a complaint reciting the earlier Prohibitory Order and stating that evidence had been produced that the order had been

violated (a) by further mailings to the addressee listed, (b) by failing immediately to delete the addressee's name from defendant's mailing lists, and (c) by selling, lending, exchanging or otherwise making transactions involving mailing lists bearing the addressee's name. The complaint stated that any response to the complaint or request for a hearing would have to be filed within 15 days after receipt of the complaint; the complaint recited that it enclosed a copy of the Department's Rules of Practice relative to answering the complaint and requesting a hearing. Defendant signed a receipt for the mailing.

Finally, under date of July 14, 1969, the Postmaster at Newark sent defendant a form entitled Order stating that satisfactory evidence had been presented that defendant had acted in violation of the Prohibitory Order and that the Attorney General was being requested to consider applying to a District Court for an order directing compliance with the Prohibitory Order. The present suit was filed on October 31, 1969.

The administrative record exhibits literal compliance with the mandate of the statute, the scheme of which has been

unqualifiedly approved in Rowan v. United States Post Office Department, 1970, 397 U.S. 728.

Defendant's affidavits do not challenge any of the controlling facts reflected in the administrative record.

1. Defendant argues first that this case and all similar cases pending in this Court* are moot because defendant never genuinely voluntarily committed a witting violation of the Prohibitory Order, but, at worst, was "guilty" of an unavoidable error due to the limitations of computer technology, and that in aggregate its erroneous mailings have been confined to a trifling number of incidents of seeming disobedience (when the number of such mailings is expressed as a percentage of its total mailings and total Prohibitory Orders) occurring despite systematic, expensive and well planned efforts to assure over-all compliance. In a word, the defendant argues that there should be no compliance order because there has been no willed disobedience and there is no threat of any future willed disobedience. Defendant asserts that its existing computer technology all but excludes the risk of future violation of the Prohibitory Orders of the Department

Defendant misconceives the scheme of the law. Compliance Orders of court are not punitive but directory; they simply

lay the groundwork for future contempt proceedings. Defendant's liability to subjection to individual Compliance Orders of court is the begetter of defendant's praiseworthy compliance effort, but that effort is not an answer to its liability to the entry of any individual Compliance Order. Proof of that effort is relevant to any future contempt case.

Plaintiff argues that Hecht Company v. Bowles, 1944, 321 U.S. 321, is authority for denying a Compliance Order here. In Hecht an injunction against the defendant's future violations of war time price ceilings was denied upon its demonstration that all earlier violations were promptly corrected when discovered and that vigorous steps were taken to prevent recurrence of violations; there was evidence of the difficulty of assuring compliance with price ceilings in the countless transactions of a very large department store. The denial of the injunction in Hecht did not mean that Hecht was not liable to refund the overcharge of each customer. The denial afforded Hecht at best temporary immunity from being held in contempt for future violations. So, in the present case, the specific relief to which each offended addressee is entitled at the Government's request is an order of court imposing on the mailer the specific duty, culpable disobedience of which will

be punishable by contempt, to avoid future mailings. The Government does not seek to subject defendant, as a systematic violator of Prohibitory Orders, to a general injunction that will make it punishable for contempt if it violates any Post Office Prohibitory Order whether or not a specific Compliance Order of court has been awarded to the particular addressee receiving the offending mailing that is the basis of the contempt application.

The very long delay in bringing the 1969 cases to judgment is not, as defendant argues, a ground for dismissal for want of prosecution. The delay is in some considerable part the result of the protraction of negotiations between defendant and the Department which were not abandoned until just before the Government filed its first motion for summary judgment in these cases. The large number of cases continuingly filed against defendant in this district, and the appropriately global approach that the parties have taken toward determining the measure of defendant's statutory responsibility, preclude any finding that there has been a want of prosecution.

In connection with the mootness argument, framed also as a "case or controversy" argument, defendant argues that the

extravagant cost of its compliance efforts, and the radical abridgement in the volume of mailings which have resulted from the measures that it has had to take in order to comply with the statute, have so gravely constrained its right to communicate that the First Amendment argument, disposed of in Rowan, must be regarded as re-presented by the circumstances of the present case. The argument, however, was unanswerably disposed of in Rowan (397 U.S. at 740). The Court emphasized throughout its opinion that it was not dealing with the right to communicate but with the right of citizens to reject the intrusion of communication upon them. The Court said in Rowan (397 U.S. at 738):

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has the right to press even 'good' ideas on an unwilling recipient."

It is further argued that, because the Government has allegedly sought compliance orders only in cases where the mailings were sexually oriented, it necessarily censored the mailings in violation of the First Amendment. Cf. Lamont v. Postmaster General, 1965, 381 U.S. 301, 306. The argument

seems to be that the working practice of the Post Office has forfeited the protection of the Rowan case because censorship is implicit in the Post Office's confining its requests for judicial Compliance Orders to cases in which sexually oriented advertisements had been mailed, and by its omitting to see such orders when the Post Office did not consider the material mailed either sexually provocative or erotically arousing (even though it had received notice from addressees that they considered, (e.g.), material mailed by American Civil Liberties Union and the Practicing Law Institute sexually provocative and arousing and even though Prohibitory Orders had been issued. It should be borne in mind that the Post Office must have a continuing concern to see that addressees do not use their statutory rights as a subterfuge for relieving their mail boxes of all "junk mail" however insusceptible it may be of defensible characterization as sexually provocative or arousing. But if there have been instances of invidious selectivity in requesting the Attorney General to seek judicial Compliance Orders, it does not appear on defendant's showing that such episodes have occurred in circumstances or to an extent sufficient to support a claim that the administration

of the statute has converted it into an instrument for Post Office censorship of mailings of sexually orient[illegible] advertisements.

2. The point defendant most strenuously argues is that the systematic and carefully planned manner in which it revised its entire mailing system in order to comply with the law and the consequent extremely low incidence of violative mailings amount to substantial compliance with the law and furnish a defense to individual complaints seeking individual court Compliance Orders. After pointing out that the publication circulated by defendant has been held not to be obscene but protected by the First Amendment, defendant shows that it has rejected the use of all mailing lists except those which have been computerized so that it can effectively eliminate violative mailings after the issuance of Prohibitory Orders. It asserts that the running cost of the computerized operation in 1969 was $62,068. It shows that it made about ten million mailings in 1969, that it received 200,000 Prohibitory Orders, and that the Post Office sustained complaints of violation in only about 500 instances, or one-quarter of one percent of the Prohibitory Orders issued. Defendant says, without contradiction, that whenever a statutory Complaint is received

from the Post Office the name of the complaining addressee is put through computer processing to eliminate from all lists; if a complaint is thereafter received, the name is once again put through computer processing so as to establish a second path for eliminating any further mailings to that addressee; if the case is later filed in Court, then the addressee's name is put through the computer processing system for a third time so as to increase the probability of total compliance.

The progressive refinement of procedures, defendant says, has resulted in a steady decrease in the number of administrative complaints of violation; there were only seven complaints in the first-half of 1972, none in the second-half, none in the first six months of 1973 and thereafter only three. Not all the complaints thus specified dealt with mailings for defendant; the complaints included mailings made by the defendant's mailing service for other enterprises. Taking the whole number of Prohibitory Orders at 248,500 the incidents of violations between January 1, 1972, and November 8, 1973, would not exceed four thousandths of one percent.

Defendant estimates - and this is necessarily an estimate - that in its efforts to assure compliance it has foregone the use of rented lists with a loss of access to perhaps as many as eight million persons. A rented list,

defendant explains, may not be copied; but effective scanning to select and eliminate addressee names must be by optical scanner, and the computers in use on defendant's work can scan only material translated into symbol-form and stored on magnetic tapes; effective scanning of rented lists would require forbidden re-copying of the lists into symbols for storage on magnetic tape.

Finally, defendant points out, to avoid mailing in violation of the Post Office Prohibitory Orders by mailings made where there were slight variances (from list to list) in the complaining addressee's name (as in the present case where the second mailing was to a person with a middle initial not present in the first mailing), the defendant set up the scanning operation to eliminate from its mailings any one the first five letters of whose last name and whose address corresponded with that of the person who had obtained the Post Office Department Prohibitory Order. That technique was later carried even farther by eliminating mailing to all addressees having in common the first five letters of their last names, the first three digits of their street address and their zip codes. Defendant estimates that over all it has spent $300,000 to comply and has achieved 99 3/4% compliance.

The showing is impressive, but it furnishes no answer to the present proceeding. The sophistication and high cost of defendant's compliance effort index the magnitude of defendant's operation and the extent of its means. They do not nullify the lapses; no matter how unintended, although they certainly reduce both the rate of lapse and the number and probability of later-stage court complaints for Compliance Orders. When violations occur, they entitle the individual addressee to the issuance of a Post Office Complaint, and, in proper circumstances, to a Post Office request that the Attorney General apply for a judicial Compliance Order. The statute is concerned with the interest of the individual addressee and does not seek to regulate the business of the publisher of the advertisements.

Moreover, what defendant has shown, if relevant, has relevancy to any contempt proceedings that might be initiated if, following the entry of judicial Compliance Order, a further seemingly violative mailing occurs. At that point the material now presented could well be offered in mitigation of the charged violation of the Compliance Order, or, conceivably, to avoid altogether a contempt adjudication.

3. In the present and in a number of other cases objection has been made to the administrative record on the ground that the certified record was not actually served with the United States Attorney's motion for summary judgment, or that the certifying officer used a short form of certification which failed, as Rule 44(a)(1) requires, to state that he has custody of the record or that, probably having no seal of office, the certifying officer has not attested his certification by his seal of office. In three cases it is pointed out that the certifying officer certifies "the annexed documents" but then fails to fill out a list of the documents as part of the certification form as the form used indicates was intended.

Defendant does not say that the administrative record is not a true copy of the record; since every instrument in it was communicated by copy to the defendant during the administrative proceeding defendant would not have any difficulty in pointing out any defect in the administrative record presented by plaintff. If it be true that the certified record recited in the Government's motion paper was not attached to the motion papers when served, that, as a matter of the normal courtesies between counsel, should simply have occasioned the

defendant's drawing the slip to the attention of the United States Attorney. To raise it months later in a brief as an objection of substance to a motion for summary judgment is not possible. Cf. United States (Austin) v. Western Electric Co., 9th Cir. 1964, 337 F. 2d 568, 574-575. Again, there is no suggestion that there was no administrative record or that the administrative record, belatedly produced, is not a true copy of the communications that constitute the record.

4. It is argued that the administrative record does not adequately show that the allegedly violative mailing was received by the addressee and mailed by the defendant more than thirty days after the defendant's receipt of the Prohibitory Order.

The objection turns on sub-division (f) of the statute, which provides that receipt of mail matter thirty days or more after the "effective date of the" Prohibitory Order creates a rebuttable presumption that the mail was sent after the effective date. Defendant argues that there was no competent evidence that any violating letter was mailed or received on any particular date, and that, in such administrative hearings as were held, the defendant was given no opportunity to confront, examine or cross-examine the alleged addressee as to

the date of receipt, since, as the Post Office pointed out and the regulation (39 C.P.R. § 916.7) notes, there is no authority in such an administrative proceeding to issue subpoenas to coerce the attendance of the addressee or other witnesses. It is argued further that for the Post Office to move forward on a hearsay statement to it that the letter had been received after the effective date of the Order, and then to fail to afford the mailer any opportunity to controvert the addressee's reported assertion is to deny the defendant due process.

The most obvious defect in the set of arguments is that the defendant does not say that the second mailings were not made and does not deny that they were made after the effective date of the Prohibitory Order. Limitations of administrative procedure do make it impossible for the mailer to coerce the attendance of the addressee, but the Post Office and the mailer are in the same position; the mailer and addressee, like the Government, are free to solicit the evidence of the other parties. Moreover, and this is the dispositive fact, the defendant itself is the best source of responsible evidence about the date of mailing. If there were doubt about

the date of the second mailing, the defendant could at once resolve it by the barest and simplest of date comparisons.

It may be that defendant's envelopes are not postmarked and so do not disclose mailing dates. It is evident from examination, however, that the defendant's mailed envelopes are metered or prepaid envelopes, that they originate with defendant, that they do not require cancellation by Post Office stamping, and that it would not be difficult for defendant, as one step in its scheme of compliance, to protect itself against imposition by dating its envelopes. That defendant's operation is so great in extent that it cannot prepare and maintain records of the dates of its various mailings is hardly a circumstance to be used at this time to dilute the efficacy of this very simple statute with its very simple procedures.

In extension of the same argument defendant urges that in a number of cases, including the present one, the administrative file fails to show in even the most informal manner that the second letter was received by the addressee more than sixty days after the entry of the Prohibitory Order. Thus in the present case the Prohibitory Order was dated

March 21, 1969; the allegedly violative letter bears a notation that it was received by the addressee on May 6, 1969. Defendant argues that no inference of a violative mailing can be drawn since, where the only administrative-record evidence of the mailing date is the statutory presumption created by proof of the date of receipt, that receipt must be more than sixty days after the date of the Prohibitory Order.

The contention is based squarely on the literal language of sub-division (f).

Two sets of considerations dispose of the contention.

First. Defendant's literal reading of sub-division (f) produces an effect that defeats the obvious meaning and purpose of the sub-division. Sub-division (f) becomes clear and harmonizes with the statutory scheme only if it is read with the word "effective" struck out in the first occurrence of the expression "effective date" so that the provision reads "Receipt of mail matter thirty days or more after the date of the order ... shall create a rebuttable presumption that such mail was sent after [the] effective date" of the Prohibitory Order provided for by sub-division (b). The scheme of the statute is this: A mailing is complained of by notice from an addressee

that it is of a kind that he does not wish to receive, and requests an order. The Post Office is obligated to issue a Prohibitory Order (sub-division (b)). In this case it was issued on March 20, 1969. The statute made the Prohibitory Order effective on the thirtieth calendar day after the addressee receives it. Every mailing to the addressee after that day violates the Prohibitory Order. It may readily be supposed that a time lapse of thirty days is provided to make compliance feasible, for large scale mailers might need time to locate and delete the name of the addressee from all their mailing lists. A second mailing on the thirty-first day is a violative mailing. If all that is shown is that the mailing was received by the addressee on the thirty-second day after the mailer's receipt of the Prohibitory Order, will proof of that receipt serve as prima facie evidence of a violative mailing? Defendant argues that it cannot so serve, that another thirty day period must elapse; a receipt cancelled at least sixty days after the date of the order can be prima facie evidence that the mailing occurred thirty days after the date of the order. The statute cannot be supposed to have intended to double the grace period except in the case where the Post Office has evidence of the date of mailing. The use

of the thirty day presumption period in exact correspondence with the thirty day period that precedes the effective date of the Prohibitory Order is the key to the meaning. If the offending mailing is shown to have been received after the effective date of the Prohibitory Order, it is presumptively a violation. The presumption is rebuttable from the defendant's mailing records. There is a semantic slip in the phrasing of sub-division (f), for the meaning of the statute is unmistakable. There is no merit-base for the argument that twice thirty days must be shown to have expired where the mailer has the evidence of the mailing date and the Post Office must rely on evidence of the date of receipt to establish the date of mailing.

Second. When the complaint is sent to a mailer he is reminded of the date of the Prohibitory Order and is supplied with a copy of the envelope in which the allegedly violative material was enclosed and is charged with violation by making that mailing. The defendant has the right to respond to the charge, to make an issue on the point, and at that juncture to come forward with evidence of mailing. It is not claimed that any accused mailing occurred before the effective date of the Prohibitory Order. If the defendant had wished to make

that point, the administrative hearing furnished the occasion to do so. In the absence of affirmative evidence that the mailing was made before the effective date, the point is lost in this Court in the failure to raise it in the administrative proceeding in an easy, effective and satisfactory way.

5. It is claimed on the basis of a card found in the Government's files during the course of an administrative proceeding in another matter that the Government in one or in some or in all cases had used a prepared typewritten or mimeographed form which explained to the complaining addressee that in order to make a case against the mailer the Post Office had to have a signed statement as to the date of delivery of the second letter. The form continued: "The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary." Then follows in the form a request that the addressee sign and return "this statement" and there is appended a statement in which evidently the Post Office had filled in the date. The example located in the Post Office file, it is suggested, was typical -

> "ON AUGUST 27, 1969, I, THELMA MOSER, RECEIVED FROM THE PEN R BOOKS a second letter.
>
> Thelma Moser [in handwriting]
> signature"

Defendant argues that this was grossly improper procedure and should forfeit the Government's right to proceed in these cases. The argument falls of its own weight. If there was no second mailing the Government could hardly supply the form to the addressee and expect it to be signed and returned and to be supported by the accusatory second-mailing envelope. Hence, the only circumstances in which the card could be used would be those in which the addressee received a second mailing, made a complaint, and then was advised of the evidence needed to make out a right to have proceedings for a Compliance Order initiated. The explanatory material on the statement is correct; the suggestion of date, which the addressee is warned is an estimated date, is plainly related to the date of the addressee's complaint to the Post Office. No suspicion attaches to the use of the form, and it is now a foundation for any objection to the Government proceedings.

6. Defendant draws attention to the fact that under the statute as originally enacted, and before the general re-writing of the Postal title in connection with the change in the structure of the post office, Section 4009 (now Section 3008 of Title 39) provided that the Postmaster General should make the Prohibitory Order, serve the complaint in case

of violation and then make the determination that the Prohibitory Order had been violated. It is argued that the Attorney General did not make any determinations in the present cases. It is argued first that the printed form then in use, and perhaps still in use, does not use the statutory word "determine" at all. Instead of saying that it has been "determined" that you or your agents or assigns acted in violation of the above-captioned Prohibitory Order the form used says only

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order," etc.

The failure to use the word of the statute is immaterial. The determination is, of course, implicit in the issuance of the Post Office order, and the assertion that it is based on satisfactory evidence hardly weakens the effect of the determination.

The second branch of the argument is that there is no showing of a delegation of the statutory authority, if it is delegable, to any other functionary in the Post Office. However, 39 U.S.C. § 309 at the times here involved provided:

> "The Postmaster General may delegate to any officer, employee, or agency of the Department such of the functions vested by law in him or in any other officer or employee of the Department as he deems appropriate."

The statute requires no particular formality of delegation. 39 C.F.R. §§ 812.1 - 812.4 outlines the modes of delegation, which are inclusive and detailed. The regulations establishing rules of practice for proceedings under § 4009 reflect one specific aspect of the delegations. 39 C.F.R. § 916.3 refers to respondents who have been served with "a complaint by the postmaster," and, elsewhere, the practice regulations assumes that an officer normally acting for the Postmaster General will be a postmaster.

Since there is a plenary power of delegation in the Postmaster General (and it is preserved in the law as revised and appears as Section 402), in the absence of some indication of a ground to infer that there has been irregularity in delegation procedure it is correct to assume regularity in official procedures and that the delegations exhibited in the cases before the Court were proper.

Defendant's central point appears to be that Section 4009 must be read to require an actual determination by the

Postmaster General himself. That would appear not to be the case in view of the presence of the delegation section in the statute and in view of the sheer physical magnitude of the task of signing orders, serving complaints and making determinations of violations under the statute. The staggering number of statutory incidents in defendant's own case demonstrates that to treat the statute as imposing a personal responsibility on the Postmaster is unthinkable. The section must be given the normal interpretation, that is, that either the Postmaster General or a delegate may exercise the authority.

7. Defendant asserts that the Complaint form used by the Post Office is inadequate since it does not give the date of the violative mailing and does not allege that the mailing was more than thirty days after the alleged receipt of the Post Office Prohibitory Order. The form used recites the date of receipt of the Prohibitory Order, and then asserts that evidence has been produced that the order has been violated by further mailings to the addressee listed in the order and that the mailer had failed to delete the addressee's name from mailing lists owned or controlled by the addressee. Attached to the complaint and referred to in it by the words

"See Exhibit attached hereto," is a reproduction of the envelope that contained the matter complained of. The form then states that a response must be filed within fifteen days and encloses a copy of the Rules of Practice relevant to answering and requesting a hearing. (In some instances the complaint form is not, probably, wholly correctly used; the Department appears to have failed to strike out parts of the printed complaint form that seem to be inapplicable to the particular incident.)

The complaint practice is adequate to the occasion. The complaint need not be one that could withstand scrutiny in an exacting court enforcing the common law rules of pleading. It need only fairly initiate the kind of proceeding contemplated by Section 4009 and its successor Section 3008. The simplicity of the issue presented by the circumstances is such and the consequence of administrative action so far removed from the imposition of any immediate sanction that elaboration of procedure is wisely avoided. The only consequence of a finding that there has been a violative mailing is to authorize the Post Office to ask the Attorney General to apply to the District Court for an order directing compliance with the original Prohibitory Order. (Sub-division(d)

says that the Post Office is authorized to ask the Attorney General to apply "for an order directing compliance with such notice" but it manifestly means "for an order directing compliance with the order given under this section.") The Court in turn then must scrutinize the papers to determine whether an order is proper, and only then is the defendant exposed to the risk that another violation might result in punishment for contempt if the violation cannot be satisfactorily explained away.

8. Defendant argues that the Post Office procedure as invariably conducted (at least in defendant's experience) violates due process because it does not provide for a traditional adjudicatory proceeding in which there is an independent judge, the production of witnesses to establish the violation with full opportunity to cross-examine those witnesses and an opportunity to meet the issue in a fully adversary manner. Defendant suggests that as the procedure has worked out it does not accord the mailer the "administrative hearing" or "full hearing" referred to in Rowan, 397 U.S. at 738-739. The contention is without substance. The Court in Rowan noted that the statute specifically excluded the pre-complaint hearing

from the provisions of the administrative procedure act; the Court noted that the adoption of the hearing regulations, 39 C.F.R. § 916.1 et seq., had nevertheless taken place, intimating the Court's belief that even the elaboration of procedure provided by the regulations was unnecessary. Again the Court said (397 U.S. at 738-739), in discussing the due process argument, that at the addressee's request "... the Postmaster General shall issue a prohibitory order to the sender ... Only if the sender violates the terms of the order is the Postmaster General authorized to serve a complaint .... The sender can then secure an administrative hearing. The sender may question whether the initial material mailed ... was an advertisement and whether he sent any subsequent mailings. If the Postmaster General thereafter determines that the prohibitory order has been violated, he is authorized to request the Attorney General to make application in a ... District Court for a compliance order ...." (footnote references omitted). Thus, in discussing the statute the Court plainly noted that the Postmaster General would be counsel, prosecutor and judge. The Court then noted (397 U.S. at 739) that since the whole administrative procedure involves no immediate sanction for a non-compliance with a Post Office Prohibitory

Order, it could not be said that the administrative aspect of the statutory procedure denied due process. The Court added (397 U.S. at 739)

> "It is sufficient that all available defenses, such as proof that no mail was sent, may be presented to a competent tribunal before a contempt finding can be made."

9. Finally it is argued that in the present case (and in twelve other cases) there was a lack of geographical jurisdiction in the Post Office issuing the Prohibitory Order. Defendant's contention is that the Prohibitory Order must issue out of the City to which the first mailing was made. In the present case, the Prohibitory Order was issued in the name of the Postmaster of the Post Office at Newark, New Jersey, through the Director of Administrative Services. The accused letter was addressed to the complaining addressee in Bloomfield, New Jersey, 07003, and the area from which the letter was mailed was Brooklyn (11223).

So far as concerns this case: Bloomfield is somewhat less than five miles from Newark; there is no indication that it is not within the administrative district of the Newark Post Office. Apart from that, there is no venue or jurisdictional requirement in the statute. No doubt in normal course

the Post Office to which the addressee sends or delivers any notice will be the one which issues the Prohibitory Order of any later complaint and request to the Attorney General, but that appears to be entirely a matter of human convenience and not at all a matter of jurisdiction or power.

It follows from what has been said that the Government is entitled to summary judgment. It is, accordingly,

ORDERED that the motion of the Government for summary judgment is granted and the cross-motion of the defendant for summary judgment is denied. A form of final judgment incorporating the compliance provision contemplated by the statute will be submitted by the Government on five days notice of settlement to the defendant within ten days after the date of the present Memorandum and Order.

Brooklyn, New York

July 3, 1974. JOHN F. DOOLING, JR.
U. S. D. J.

Footnote:

Of the approximately 70 related cases involving Pent-R-Books pending before this Court, motions for summary judgment have been filed in the following 28 cases:

69 C 1290	72 C 583	72 C 598	72 C 606
69 C 1362	72 C 584	72 C 599	72 C 607
69 C 1363	72 C 585	72 C 600	72 C 608
72 C 579	72 C 586	72 C 601	72 C 609
72 C 580	72 C 587	72 C 602	72 C 610
72 C 581	72 C 588	72 C 603	72 C 611
72 C 582	72 C 597	72 C 604	72 C 612

They involve many of the issues passed on in the present docket, and the decisions in those dockets will incorporate by reference the applicable parts of this decision.

SUPPLEMENTAL MEMORANDUM AND ORDER BY DOOLING, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	69 C 1362
-against-	:	(IRELAND)
PENT-R-BOOKS, INC.,	:	SUPPLEMENTAL MEMORANDUM and ORDER
Defendant.	:	

Defendant correctly points out that the Prohibitory Order was stamped with the issue date March 20, 1969. That is, it is agreed, the date to use at page 1 of the Memorandum and Order of July 3, 1974, filed July 8, 1974, rather than July 14, 1969, which is the date of the self-styled "Order" notifying defendant that the Postal Service is requesting the Attorney General to consider applying to a District Court for an Order directing compliance with the Prohibitory Order. The date has been changed on page 1 of the Memorandum and Order, and at line 1 of page 18.

Defendant correctly says that the envelope of the allged mailing has a simple notation in unidentified handwriting that the envelope was received 5/6/69 without indicating by whom or at what place. Page 18, line 2, has, accordingly, been corrected by deleting the words "by the addressee."

SUPPLEMENTAL MEMORANDUM AND ORDER BY DOOLING, J.

To avoid confusion, at page 20 in the second line of the paragraph commencing "Second," the words "receipt of the" are inserted before "Prohibitory Order." That is the language of the "Complaint," which recites the date March 21, 1969, as the receipt date.

The changes made have been initialled in the left margin of the pages on which they occur, and the Memorandum and Order of July 3, 8, 1974 is amended accordingly.

The letter of defendant's counsel of July 13, 1974, and its enclosure, will be docketed and filed as part of the record.

The arguments on the issues made in the July 13 letter are not agreed to and the decision will not be otherwise changed.

It is so ORDERED.

Brooklyn, New York

July 16, 1974. JOHN F. DOOLING, JR.
U. S. D. J.

LETTER FROM HERBERT MONTE LEVY TO HON. JOHN F. DOOLING.

LAW OFFICES OF
Herbert Monte Levy

295 Madison Avenue, New York, N.Y. 10017

TEL. 725-5959

CABLE ADDRESS ADVOCALAWS

July 13, 1974

Hon. John F. Dooling
U. S. District Court
225 Cadman Plaza East
Brooklyn, New York

Re: U. S. v. Pent-R Books, Inc.
69 C 1362
(Ireland)

My dear Judge Dooling:

In your memorandum and order in the above matter, you took me to task as follows (PP. 14-15):

> "***If it be true that the certified record recited in the Government's motion paper was not attached to the motion papers when served, that, as a matter of the normal courtesies between counsel, should simply have occasioned the defendant's drawing the slip to the attention of the U. S. Attorney."

The slip of the Government in not sending the certification (it did send the"record") was indeed drawn to the attention of the U. S. Attorney, immediately after the Government in Washington had turned down all settlement proposals. Thus, in my letter of October 11, 1973 to the U. S. Attorney, photocopy of which is enclosed, I mentioned the following on page 3.

> "In our phone conversation, you mentioned that you had submitted certification in every pending case. However, the papers served upon me omit certifications in the following cases: *** 69 C 1362 ****.

LETTER FROM HERBERT MONTE LEVY TO HON. JOHN F. DOOLING

Herbert Monte Levy

Would you kindly send me copies of the certifications in such cases, noting the Court Docket number of each certification."

These certifications were never received by me.

I am rather unhappy at the suggestion in your opinion that I was guilty of a lapse of normal courtesy between counsel. No one had raised the question of whether or not I had requested copies of the certifications, and quite frankly, I had not wanted to embarrass the U. S. Attorney by noting that I had not been given the courtesy of being given copies of the certifications, if indeed any were submitted to the Court in the enumerated cases.

In any event, I would hope that this letter and the enclosed could be made a part of the record, which would avoid the necessity of a petition for rehearing to set the record straight.

I also note that you recite on page 15 that

"Again, there is no suggestion that there was no administrative record or that the administrative record, belatedly produced, is not a true copy of the communications that constitute the record."

The opinion goes on to note that we did not say that the second mailings were not mailed and that they were mailed after the date of the order, and the defendant is criticized for not being a reliable source of evidence about the date of the second mailing. However, there is no requirement on a summary judgment motion by plaintiff that the defendant produce any evidence whatever, when the plaintiff has failed to produce any competent admissible evidence in support of its application for summary judgment. Since we were not entitled at any stage to examine any witness as to the truth of the contents of any notation in the so-called administrative record, and since we are not required to prove the Government's case, I submit that it is entirely correct for the defendant to insist that the Government prove its case by a record produced in accordance with the Federal Rules of Civil Procedure, at a minimum.

LETTER FROM HERBERT MONTE LEVY TO HON. JOHN F. DOOLING

Herbert Monte Levy

Hon. John F. Dooling - 3 - July 13, 1974

I have already noted to your law secretary that by reading the word "effective" out of the statute (P. 18), the statutory scheme is distorted. To hypothecate a case: if a Prohibitory Order is dated January 2, 1974 and received by a mailer on February 1, 1974, and the second mailing is received by the addressee on February 1, 1974, the presumption would be that the second mailing was made on February 1, 1974. The mailer would have been given no time to comply with the Prohibitory Order, though the statute gives the mailer thirty days in order to comply. And even if the order had been received on January 5, the mailer would be deprived of his thirty day grace period.

May I also call to Your Honor's attention a couple of other errata. On page 1, you recite that the Prohibitory Order was issued on July 14, 1969, which is completely inconsistent with the recital on pages 17-18 that it was dated March 21, 1969. The actual date stamped by the Post Office was March 20, 1969.

You also noted on page 18 that the second letter bears a notation that it was received"by the addressee" on May 6, 1969. However, one of the points we raised was that it does not bear such a notation, but bears simply a notation that it was received on May 6, 1969, without stating by whom it was received. It is entirely possible in the light of the purported administrative record that Mr. Ireland may have received the second mailing less than thirty days after the date of the Prohibitory Order, that he may have taken it to the Post Office much later, and that the date of May 6, 1969 may be the date the Post Office received it from him. Yet an order is being enforced without any proof whatsoever that it was violated.

May I ask that this letter be considered as an informal petition for a hearing and incorporated in the record. In any event, I ask that the opinion be corrected to show that I was not guilty of any professional impropriety.

Respectfully,

Herbert Monte Levy

Herbert Monte Levy

HML:nw
cc: U. S. Attorney
David C. Trager

LETTER FROM HERBERT MONTE LEVY TO LLOYD H. BAKER

October 11, 1973

Robert A. Morse, Esq.
United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

Attn: Lloyd H. Baker, Esq.

Re: U. S. v. Pent-A Books
69 C 1290 and other similar cases.

Dear Mr. Baker:

This will confirm our understanding reached over the telephone, and the enclosed stipulation.

I advised you that it seemed to me that the work of Court and counsel could be simplified by dispensing with a lot of unnecessary paper work, and adopting an approach which might be more helpful to the Court in the light of the fact that some approximately 30 cases are presently pending. The same suggested procedure would accordingly be followed in any such future cases which might be brought by the United States.

The thought is that, subject to Court approval, we will each waive the requirement of filing any Rule 9 statement, and that, instead of submitting a separate and different brief in each case, I will submit the same brief in each case, covering all points that I wish to raise in

LETTER FROM HERBERT MONTE LEVY TO LLOYD H. BAKER

Robert A. Horsa, Esq.
October 11, 1973

any and all cases, indicating at the conclusion or beginning of each point, (whichever seems most appropriate), the docket numbers of the particular cases that such particular point is applicable to. Thus, any particular points which might be found determinative by the Court could easily be found to determine the particular cases therein referenced, and decision and/or judgment could be rendered accordingly more expeditiously. This motion would be open to you, as well. Of course, one xerox copy of the brief would be furnished to the Court for placement in each respective file. Please advise me whether you would also similarly want individual copies for placement in each of your files, or whether one copy will serve your purposes.

I also noted that we had long since agreed that there would be no need for defendant to file an answer in any of these cases, since, in each case, you intended to proceed by motion for summary judgment. We both agree that we should have cleared this with Judge Dooling, and the enclosed stipulation provides a way of doing so. It occurred to me after our conversation that should a case go to trial, there might be a need for conformed copies of the pleadings at such time, and so I have put in a phrase to take care of this contingency.

The enclosed stipulation also notes our agreement in regard to costs.

May I also take this opportunity to remind you that I am authorized to accept service of any summons and complaint on behalf of my client, which can make life a bit better for you and the U. S. Marshal, though I would suggest that the U. S. Marshal call me before saying he's a visit with any papers. I would also suggest that his time might be saved if one paper could be prepared, merely reciting [illegible] copy received this [illegible] day of [illegible], [illegible] of summonses and complaints in the following cases, with a list of cases to follow thereafter. This could then be circulated by you, and could avoid the necessity of our separately mailing acknowledgments of receipt.

LETTER FROM HERBERT MONTE BAKER TO LLOYD H. BAKER

Robert A. Morse, Esq.
-3- October 11, 1973

Will you be good enough to execute the enclosed stipulation, if it seems to be in accordance with our agreement, and return to me together with a copy thereof, and I shall then submit it to Judge Pooling for signature.

I note that I have misplaced my copy of the summons and complaint in 72 C 504. Would you be good enough to supply me with a copy thereof.

In our phone conversation, you mentioned that you had submitted certification in every pending case. However, the papers served upon me omit certifications in the following cases:

72 C 609 Hull
72 C 585
69 C 1362
72 C 612
72 C 604
72 C 603
69 C 1290
72 C 602
72 C 607
72 C 534
72 C 611
72 C 597
72 C 610
72 C 606

me

Would you kindly send/copies of the certifications in such cases, noting the Court Docket number on each such certification. Thank you.

Sincerely,

Herbert Monte Baker

HMB:gs
cc: Penn-R Books, Inc.

JUDGMENT APPEALED FROM.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUL 1 1974 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

JUDGMENT

Civil Action
No. 69 [illegible] 1362

Plaintiff having brought this action for an order of this Court commanding the defendant to comply with a certain Prohibitory Order issued by the United States Postal Service directing defendant to refrain from mailing any advertising material to L. Ireland, 3 Mill St., Bloomfield, New Jersey, plaintiff having moved for summary judgment, and defendant having cross-moved for summary judgment, and the Court having rendered and filed its Memorandum and Order dated July 3, 1974, granting the plaintiff's motion for summary judgment and denying the defendant's cross-motion for summary judgment, now on motion of DAVID G. TRAGER, United States Attorney, it is

JUDGMENT APPEALED FROM

ADJUDGED and DECREED that the defendant be, and it hereby is commanded to comply with Post Office Department Prohibitory Order No. 5776, and the defendant is commanded to cease and desist from any further mailings to L. Ireland, 3 Mill St., Bloomfield, N.J. 07003, ~~New Jersey~~, to delete the name of said addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging or engaging in any other transaction involving mailing lists bearing the name of said addressee.

Dated: Brooklyn, New York
July 17, 1974

UNITED STATES DISTRICT JUDGE

Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,
Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

----------x

69 C 1362
NOTICE OF APPEAL

Notice is hereby given that Pent-R-Books, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 18th day of July, 1974.

September 13, 1974

Herbert Monte Levy

HERBERT MONTE LEVY
295 Madison Avenue
New York, New York 10017
(212) 725-5959
Attorney for Pent-R-Books, Inc.

To U.S. attorney
Brooklyn N.Y.
attorney for Plaintiff

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

Plaintiff;

v.

PENT-R-BOOKS, INC.,

Defendant.

- -X

CIVIL ACTION NO. 72C 579.

DOCKET ENTRIES.

72C 579

DATE	PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. srvd 5-25-72.	2
9-27-73	Notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	5/
7-30-74	BY DOOLIN C. - Memorandum & order dtd. 7-29-74 granting pltff's motion for summary judgment & denying deft's cross-motion etc. filed.	7
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft to refrain from further mailings to J. Mark etc. filed.	8
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

COMPLAINT

Civil Action No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about April 21, 1969, defendant mailed or caused to be mailed through the U. S. mail to J. Mark, Detroit, Michigan (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

COMPLAINT

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on April 28, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 8506, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about June 30, 1969, in violation of Prohibitory Order No. 8506, defendant, or someone acting on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

COMPLAINT

11. On July 7, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 8506, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or abou the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On August 18, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 8506.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

COMPLAINT

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 8506, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,	:	NOTICE OF MOTION
Plaintiff,	:	72 C 579
- against -	:	
PENT-R-BOOKS, INC.,	:	
Defendant.	:	

- X

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for an

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

order pursuant to Rule 56 granting summary judgment to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By:

LLOYD H. BAKER
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 Madison Avenue
New York, New York 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

November 10, 19 6

CERTIFICATION

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: The Postmaster's Order finding Adler in violation of the Prohibitory Order in the matter of P. O. Docket No. 1157 (N. York)

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

November 10, 1969

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: The Postmaster's Order finding mailer in violation of the Prohibitory Order in the matter of P. O. Docket No. 1157 (T. Mark)

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

140a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

November 13, 19 [illegible]

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: [illegible]

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

REGISTERED
NO. 593238

In the Matter of Violation of Prohibitory Order No. 8506
Issued Against

Pent-R Books, Inc.

P. O. Box 81

Brooklyn, N. Y. 11223

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. 1157

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

E L Baker

Postmaster E. L. Baker

Detroit (City) Michigan (State) 48233 (ZIP Code)

[POSTMARK]

Dated: August 18, 1969

DETROIT, MICH. AUG 18 PM 1969 G.P.O.

POD Form 2154
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA
POST OFFICE DEPARTMENT

In the Matter of Violation of)
)
Prohibitory Order No. 8506)
)
Issued against)
)
Pent-R Books, Inc.) P.O. Docket No. 1157
)
P. O. Box 81)
)
Brooklyn, N. Y. 11223)
)
and agents or assigns, pursuant to authority)
of Title 39, U.S. Code 4009.)

HEARING DENIAL

Rule 956.3(a) of the Rules of Practice in Proceedings Relative to Violations under 39 U.S. Code 4009 requires that a request for the hearing provided by subsection (d) of 39 U.S. Code 4009 be made in writing and filed with the appropriate postmaster no later than fifteen days from the date of receipt of the violation complaint. As your request for a hearing on the above-captioned matter does not comply with the cited rule, it is denied.

Dated: August 11, 1969

John Q. Sheehan
Regional Counsel
New York Region
Post Office Department
New York, N. Y. 10098

cc: Office of General Counsel

POD Form 2165
Sep. 1968

GPO 804-740

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. [redacted]
Issued Against

[redacted]

[redacted]

[redacted]

and agents or assigns.

On behalf of:

[redacted]
Complaining Addressee

568426

P. O. Docket No. 1157

On the [redacted] day of [redacted], 19[redacted], you received Prohibitory Order No. [redacted], copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You, or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify): [redacted]

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, [redacted] (Address) [redacted], within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter. See Rule 956.3

[POSTMARK]

Dated: [redacted]

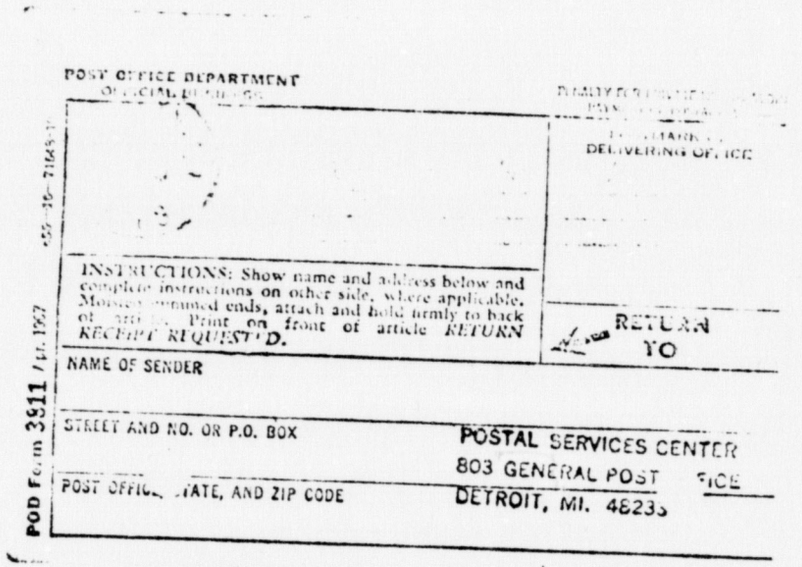
DETROIT, MICH. JUL 7 1 PM 1969 G.P.O.

E. L. Baker
Postmaster
E. L. Baker

[redacted] City [redacted] State [redacted] ZIP Code

POD Form 2153
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



POST OFFICE DEPARTMENT

DELIVERING OFFICE

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Mo[illegible] gummed ends, attach and hold firmly to back of [illegible]. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

STREET AND NO. OR P.O. BOX — POSTAL SERVICES CENTER 803 GENERAL POST [illegible]ICE

POST OFFIC[illegible]TATE, AND ZIP CODE — DETROIT, MI. 48235

POD Form 3811 /[illegible] 1967

[illegible]-16-71845-1

5506 & 1157

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 56496

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

SHOW WHERE DELIVERED (*only if requested*)

[illegible]-16-71[illegible]-16 GPO

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

PENT-R BOOKS INC.

P. O. B
BROOK

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

POSTAGE WILL BE PAID BY

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit No. 9546

BOX 81
LYN, N. Y. 11223

Refused
M

Prohibitory Order
No. 8506
received 6/30/69
J Harp

FIRST CLASS MAIL

Mr. J. Mack
8423 Minock
Detroit, MI 48228

and sign statement to that effect above, to order. No

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

P. O. BOX 81
BROOKLYN, N. Y. 11223

REFUSED
Proh. # 8506
received 7-5-69

FIRST CLASS MAIL

Mr. J. Marks
8423 Manoch St.
Detroit, Michigan 48228

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHU
offering for sale to Adults Only, a new marriage manual. If you do not w
this mail or if you are not over the age of 21 years, DO NOT OPEN
THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your
initials and return it to your mailman. Upon the receipt of this envelope, we
will endeavor to remove your name from our mailing list. Thank You.

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit No. 9545

st be over the age of 21 years and sign statement to the effect above, to order. No book

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

PROHIBITORY ORDER

In the Matter of

[redacted]
P.O. Box 1555 Mailer
Grand Central Station

[redacted]
and agents or assigns

TC8164

PROHIBITORY ORDER

NO. 8506

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

[redacted]
(Name of Addressee)

[redacted]
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

[redacted]

ADDRESS: [redacted]
(Street)

[redacted]
(City) (State) (ZIP Code)

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[redacted]
Postmaster

[redacted]
City State ZIP Code

[POSTMARK]

DETROIT, MICH. APR 28 PM 1969 G.P.O.

Dated: [redacted]

POD Form 2152
May 1968

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.".

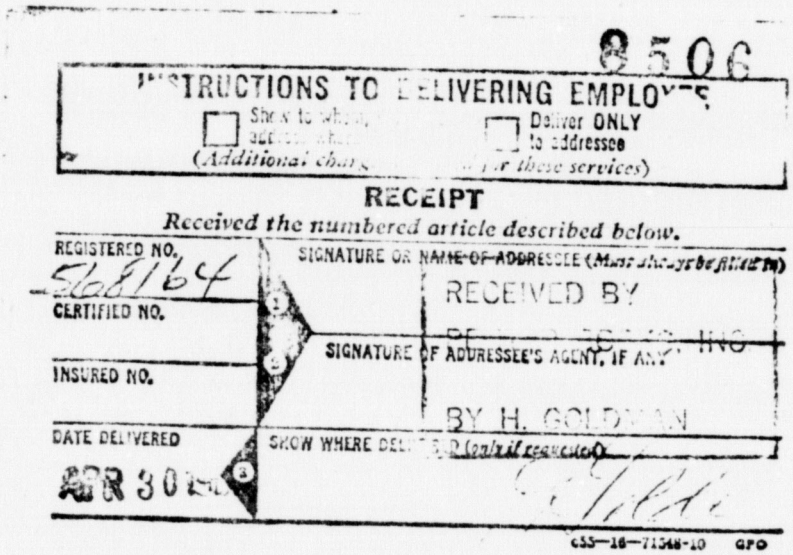
(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009 Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



8506

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, address where delivered (Additional charge)

☐ Deliver ONLY to addressee (For these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 568164

CERTIFIED NO.

INSURED NO.

DATE DELIVERED APR 30

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

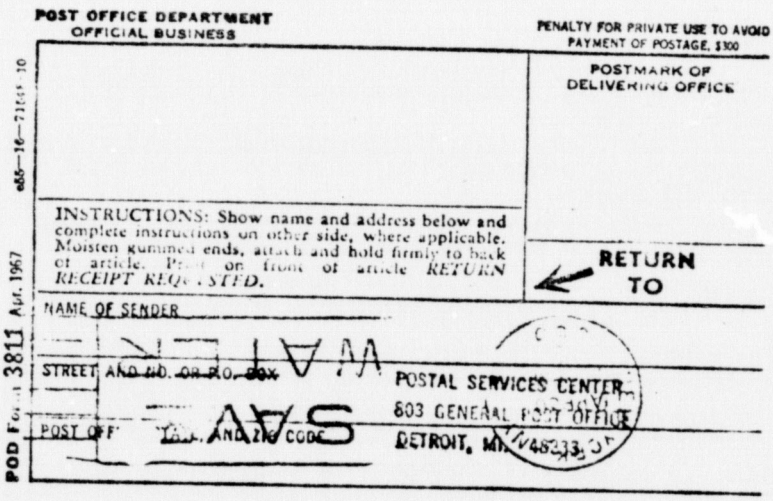
RECEIVED BY

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

BY H. GOLDMAN

SHOW WHERE DELIVERED (only if requested)

C55—16—71548-10 GPO



POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

STREET AND NO. OR P.O. BOX

POST OFFICE, STATE, AND ZIP CODE

POSTAL SERVICES CENTER
603 GENERAL POST OFFICE
DETROIT, MI 48233

POD Form 3811 Apr. 1967 C55—16—71548-10

150a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

8506

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, J Mark (Print), addressee [parent of minor addressee] of the enclosed mailing from Pent-R Books, Inc. (Print),

P.O. Box 1555, New York, N.Y. 10017, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

✓ J Mark (Signature) April 22, 1971 (Date)

✓ 2493 Merrick (Street)

✓ Detroit, Mich (City, State) 4[illegible] (ZIP Code)

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

8506

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

BROOKLYN N. Y.

FIRST CLASS
U. S. POSTAGE
PAID
6c
Permit # 9546

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

151a

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

Refused

FIRST CLASS MAIL

[redacted]

must be over the age of 21 years and sign statement to that effect above to order

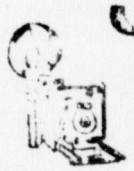
NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign [redacted] initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

NOW AVAILABLE FOR THE FIRST TIME ANYWHERE

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"



AMERICA'S FIRST COMPLETE "SEX COURSE" IN ONE VOLUME!

NOW FOR THE FIRST TIME, THE MYSTERY OF SEX IS UNLOCKED THROUGH THE AID OF OVER 150 ACTUAL PHOTOGRAPHS OF A LIVE MAN AND A LIVE WOMAN TOGETHER ENGAGED IN SEXUAL INTERCOURSE POSITIONS!



DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL?

PENT-R BOOKS INC. P.O. BOX 1555, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear . . . "Don't worry, she has time" . . . or . . . "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall the stoop the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle jokes. And above all shall we allow our youth to hear every old-wives-tale every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back . . . for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness is disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something private, something personal, something one person does not quickly reveal to another. In far too many cases, a person remains silent, remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarital pregnancy is at it's highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one topic in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL, we ask again? We think yes, most definitely yes and we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes . . . because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indespensible aids to learning in just about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to the reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well or accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose is to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her own conclusions. We feel that to publish our book "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" without photographs would be a dis-service to our readers and would confuse rather then enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 21 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adult who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even with years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexual pleasures, complete sexual satisfaction and to inspire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form for your convenience.

We suggest that you order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE", read it, show it to your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediate refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won't get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain.

With my sincere personal good wishes,

Ronald [illegible]

P.S. This book cannot now be obtained in any book store or from any other mail order house at this present. It is available from the publisher, Pent R Books Inc.

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No.
72 C 579

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 579

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

AFFIDAVIT OF HERBERT MONTE LEVY

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any

order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the

Postmaster General. The determination here, such as it was, was made by a Postmaster

We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is

violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under

the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations

are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local

Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand

for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

AFFIDAVIT OF HERBERT MONTE LEVY

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Moreover, in this particular case, the only document purportedly certified is the Post Office Order purportedly adjucating a violation of the statute. None of the other records annexed to the moving papers have been certified. The existence of the order of the Post Office finding a violation, of course, does not prove a violation in this Court, where defendant is entitled to a trial de novo.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the

prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the order was issued by a local Postmaster, who had no authority to issue such an order. If indeed there was any administrative regulation authorizing the delegation to a local postmaster of the power to issue a prohibitory order, then, we submit, there is simply no authority in law for such delegation to have been made, where, as here, the statute expressly requires the Postmaster General to issue the order.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of J. Mark. However, the second and third alleged mailings were not to such person, but were addressed to different names, to wit, J. Mack and J. Marks, persons not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government,

in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented

material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions,

and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off

the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness,

judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The handwriting appearing on the second alleged mailing envelope does not appear to be the same handwriting in which the complaining addressee made his original request for a prohibitory order. It is quite different.

The alleged receipt purporting to show (re 2d mailing) the date of receipt, purportedly signed by the complaining addressee, does not clearly show the date it was received. It merely recites "received," or a word or words to such effect. The next line sets forth the name of the addressee. This may well show the date the Post Office received the material from the complaining addressee, rather than the date that the complaining addressee received

the second mailing from the defendant. It certainly is not proof that this was the date of receipt by the complaining addressee of the defendant's second alleged mailing.

The writings purporting to indicate receipt by the signatory contain what are apparently two different handwritings, one handwriting showing the alleged date of receipt, and one showing the signature underneath. Since these are in apparently two different handwritings, it is impossible to tell whether or not the date of receipt was perhaps inserted by the Post Office, rather than by the addressee himself. It may be that a trial would disclose this, with an opportunity to examine the complaining addressee, and hence summary judgment should be denied to the Government.

The proof of date of receipt of the third alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply no signature to even vouch for such a date of receipt -- even by the Post Office.

AFFIDAVIT OF HERBERT MONTE LEVY

The signature purporting to show the receipt of the second mailing is palpably different from that which appears elsewhere in the same file. There is no proof whatsoever, and the Government's motion should be denied.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, the order was issued by a local Postmaster.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

AFFIDAVIT OF HERBERT MONTE LEVY

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

DEMAND FOR HEARING ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
E. L. Baker
Detroit, Michigan 48233

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: Pent-R Books, Inc.
ads. P.O. (Mark)
P.O. Docket No. 1157

DATED: July 25, 1969

Client has received the Complaint in the above matter, dated July 7, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory r, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionality both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in Book Bargains ads. P.O. (Reiff), P.O. Docket No. 984 .] We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here (XXX) (are) (XXXXXXXXXX) (nullities). If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

DEMAND FOR HEARING ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the effective date of the Prohibitory Order, the Complaint fails to state a cause of action. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. The Order prohibited a mailing to J. Mack. However, the second mailing was to J. Mack. Thus, the Order was clearly not violated.

4. The second mailing was refused. Therefore, the addressee could not have made the necessary determination as to its contents.

5. There were no contents of the contents of either mailing attached to the Complaint, but only the envelope re the second mailing.

_____

Herbert Monte Levy

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

August 12, 1969

William Lawrence, Esq.
Assistant General Counsel
Mailability Division
Post Office Department
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Mark)
P.O. Docket No. 1157

Pent-R Books, Inc. ads. P.O. (Featherston)
P.O. Docket No. RN-11 NO-27

Please refer to my letter of August 11th to you. Today I have received two more hearing denials, both in connection with the above cases. They are particularly aggravating, inasmuch as in the Mark matter, the complaint was received by client on July 14th and the demand for hearing mailed on July 25th -- only 11 days later --, while in Featherston the complaint was received on July 19th, and the demand for hearing sent on August 1st.

I request, and I am sure you will grant, leave to have my arguments of yesterday's letter incorporated by reference herein, treated as a brief, and this letter treated as a notice of appeal.

I am also sending a copy of this letter to the Attorney General.

Sincerely,

Herbert Monte Levy

HML mol

cc: Hon. John Mitchell

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

LAW OFFICES
OF
HERBERT MONTE LEVY
295 MADISON AVENUE
NEW YORK, N.Y. 10017
(212) 689-2220

November 18, 1969

William Lawrence, Esq.,
Assistant General Counsel
Mailability Division
Post Office Department
Washington, D.C.

Dear Mr.Lawrence:

Re: P.O. Docket Nos. R-11-FWT-90; R10-OK-23; R8-DM-57; 1157; R-14, PD-99; R-14, PD-100; R-14, PD-98; R-14, PD-101; CIN-450; CIN-448; and CIN-449.

Again, please consider this letter as a Notice of Appeal, incorporating all prior arguments in all prior letters, from the Orders in the above entitled matters.

Before going further, I note that I am deeply distressed in that two actions have been commenced against my client, Pent-R Books, Inc., both involving matters on which I had appealed to you, one in my letter of August 11 (Wilcox) and the other of which I had appealed to you on in my letter of September 2nd (Gladden). I simply do not understand how the appeals can still be pending before you in those matters, and a court action brought. If your ruling is that you have no jurisdiction to entertain such appeals, kindly advise me so that I may save the time and effort of taking these appeals. In any event, I am sending a copy of this letter to the U.S. Attorney's Office in Brooklyn, for its information.

In Cannon, I note that the Demand for Hearing was mailed on November 6; client having received the complaint on October 24 only 13 days earlier. Yet the Order was made on November 7th, which was, of course, still within the period when an answer could have been filed. The Order is thus totally illegal.

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

In Strong, the complaint was received on October 23, the Demand for Hearing served on November 5, again 13 days later, and this time the Order was made on November 7, which was the deadline date for "filing".

The Order in Harter, dated August 18, 1969, was received by client on November 14, 1969, and it is again difficult to understand, since in my letter to you of August 18, I had appealed to you from the Hearing Denial in this matter. Similarly, in Mark, I had appealed to you in my letter of August 12 from the Hearing Denial therein, and I am still waiting for action on that appeal.

In the Orders entered in the next four matters, in each case the complaint had been received on October 20, and the Demand for Hearing was sent only 11 days later, on October 31. And, in the last three cases, the complaints were received on October 24, and the Hearing Demands sent out November 6, only 13 days later.

I do not know what is holding up your rulings. I have tried to reach you on the phone several times, but without success. Please do let me hear from you as soon as possible on these matters.

Very truly yours,

Herbert Monte Levy

Herbert Monte Levy

HML/mol

cc: U.S. Attorney's Office
Brooklyn, N.Y.

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
72 C 579

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint.

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for"The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and

capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of

violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and

process the system. As we note at length below, difficulties were encountered because of the use of [illegible] lists, and rented lists were finally abandoned u[illegible] they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to

be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost

all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have

been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt).

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints, (only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as

doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the

statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

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*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list

without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the

following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office

error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy.

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* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer.

AFFIDAVIT OF RICHARD S. SCHWARTZ

To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with

prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

I understand that according to the purported so called certified file in this case, the purported return receipt for the administrative Post Office complaint is dated However, as noted above, it was our practice and remains our practice to stamp or otherwise indicate on the envelope in which the complaint was contained, the date of its receipt by us. The date of its receipt by us, according to the envelope, which will be annexed hereto, is July 14, 1969, though the date of receipt according to the purported return receipt is July 11, 1969. If we are correct in our date of receipt, then it is patent that the demand for hearing, which our attorney's affidavit indicates was sent on the date it

bears, was sent in time, and that we were improperly denied a hearing before the Post Office Department in this case, a default having been taken without just cause. This raises an issue of fact warranting a trial.

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:
> 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

AFFIDAVIT OF RICHARD S. SCHWARTZ

However, in this case, all that was annexed to the complaint was the prohibitory order and the second (but not the third) alleged mailing envelope. Thus, we were never given administrative notice of the third alleged mailing.

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived deffendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION.

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DETROIT, MI. 48233

OFFICIAL BUSINESS
P-192

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PAYMENT OF POSTAGE, $300

REGISTERED
NO. 568426

RETURN RECEIPT REQUESTED
ADMINISTRATION OF 39 U.S.C. 4009

Pent-R Books, Inc.
P. O. Box 81
Brooklyn, N. Y. 11223

20

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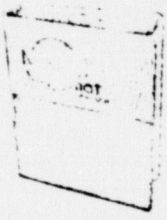
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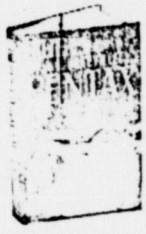
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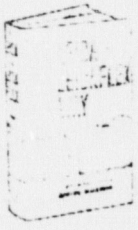
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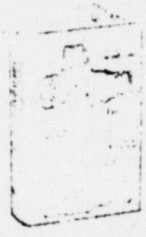


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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley*: Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers, Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer, John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Hue, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths*:

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack.

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

: :

-against-

:

PENT-R-BOOKS, INC.,

:

Defendant.

- - - - - - - - - - - - - - - - - - - -X

72 C 579
(MARK)

MEMORANDUM
and
ORDER

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 580, 72 C 582, 72 C606 and 72 C 60 , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

was ignored. It was mailed to the Postmaster at Detroit, Michigan, , from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

- -X

72 C 579
(MARK)
JUDGMENT

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John T. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC. its agents and assigns (1) refrain from any further mailings to J. MARK, 8423 MINOCK, DETROIT, MICHIGAN, 48228,

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its

JUDGMENT

agents or its assigns; and (3) immediately abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 29,1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

- -X

CIVIL ACTION NO. 69C 1363.

DOCKET ENTRIES

69C 1363 [illegible] BOOKS, INC.,

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
10/31/69	COMPLAINT FILED. SUMMONS ISSUED.	1	
11-19-69	Summons returned and filed. Deft srvd on 11/17/69.	2	
1-20-70	By DOOLING, J.- Order filed extending time for deft to answer complaint to June 5, 1970 etc. (P/C mailed to attys)	3	
6/25/70	ANSWER of deft. filed. (Served on 6/25/70)	4	
7-1-70	Before DOOLING, J.- Case called -Pre-trial held and concluded.		
11/17/71	By Dooling, J.-Conference memo & Order directing that Mr. Levy & Asst. US Atty submit draft decrees, etc., as indicated, filed. (Filed in 69C1290)	--	
9-8-73	Notice of motion and memorandum of law granting summary judgment in favor of pltff ret 9-26-73 at 4:30 P.M. filed.	5/6	
9-8-73	Pltff's statement pursuant to local rule 9(g) filed.	7	
11-29-73	Notice of cross motion and memorandum insupport of deft's cross motion for summary judgment filed.	8/9	
7-30-74	By DOOLING, J. - Memorandum & order dtd. 7-29-74 granting pltff's motion for summary judgment & denying deft's cross-motion filed.	10	
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft. to refrain from futther mailings to Lora Gladden etc. filed. (Copies to attys)	11	JS6
9-19-74	Notice of appeal filed. Duplicate mailed to C of A.&pltff. jn	12	

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

COMPLAINT

Civil Action

No. 69C 1363

- X

Plaintiff, UNITED STATES OF AMERICA, by its attorney, EDWARD R. NEAHER, United States Attorney for the Eastern District of New York, for its complaint, upon information and belief, alleges as follows:

FIRST: That plaintiff is a corporate sovereign and body politic.

SECOND: That this Court has jurisdiction of this action pursuant to the provisions of Title 39 United States Code, Section 4009 (Public Law 90-206 Section 301) and Title 28 United States Code, Section 1345.

THIRD: That defendant is a New York corporation having an office or represented by duly authorized officers or agents in the City of New York at 203 Kings Highway, Brooklyn, New York.

COMPLAINT

FOURTH: On or about May 2, 1969, defendant mailed or caused to be mailed through the United States mail to Lora Gladden of Joplin, Missouri (hereinafter referred to as "addressee"), material offering for sale a publication entitled The Photographic Manual of Sexual Intercourse (hereinafter referred to as the "advertisement" or "advertisements").

FIFTH: That the above-described mailing consisted of pandering advertisements which the addressee believes to be erotically arousing or sexually provocative.

SIXTH: That the addressee requested the Postmaster General to issue an order directing defendant, its agents and assigns, to refrain from further mailings of such material to her.

SEVENTH: That upon receipt of this request and pursuant to Title 39 United States Code, Section 4009, on May 7, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 1416, which ordered and directed defendant, its agents and assigns to refrain from any further mailings to the addressee, to delete her name from any sales or transactions involving lists bearing her name, effective thirty (30) days after receipt of this order. A true copy of the order is attached as Exhibit A hereto and made a part hereof.

COMPLAINT

EIGHTH: A copy of the order was mailed to defendant by registered United States mail on or about the date it bears.

NINTH: Thereafter the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

TENTH: On or about June 13, 1969, in violation of Prohibitory Order No. 1416, defendant, or someone acting on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph fourth of this complaint.

ELEVENTH: On July 3, 1969, the local Postmaster, by order of the Postmaster General, issued a Complaint advising that evidence had been received that defendant or someone acting in its behalf had violated Prohibitory Order No. 1416, and advising defendant that any response or request for hearing had to be filed within fifteen (15) days. A true copy of said Complaint is attached as Exhibit B hereto and made a part hereof.

TWELFTH: A copy of the Complaint was mailed to defendant by registered United States mail on or about the date it bears.

THIRTEENTH: Defendant did not request a hearing or otherwise respond to the Complaint.

COMPLAINT

FOURTEENTH: On July 24, 1969, a determination was made that defendant or someone acting in its behalf had violated Prohibitory Order No. 1416. A copy of said determination is attached as Exhibit C hereto and made a part hereof.

FIFTEENTH: A copy of the determination was mailed to defendant by registered United States mail on or about the date it bears.

SIXTEENTH: The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of 39 United States Code, Section 4009, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, United States of America, prays:

A. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 1416, and more specifically, that this Court order and direct defendant, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee herein, to immediately delete the name of said addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from

selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

B. That this Court grant to plaintiff such other and further relief as may be just and proper.

EDWARD R. KEARNEY
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By: Ralph A Bontempo
RALPH A. BONTEMPO
Assistant U. S. Attorney

EXHIBIT A, ANNEXED TO COMPLAINT. 223a

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

14474

In the Matter of

Postal Books, Inc.
Mailer

P. O. Box 61

Brooklyn, N. Y. 11223

and agents or assigns (Your label code - 7 614)

PROHIBITORY ORDER NO. 2116

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

LORA GLADDEN
(Name of Addressee)

612 HIGHLAND JOPLIN MO 64801
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

Lora Gladden

ADDRESS: 612 Highland
(Street)

Joplin *(City)* Missouri *(State)* 64801 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

KANSAS CITY MAY 7 1969 MO.

Dated: May 7, 1969

Postmaster

City Kansas City, State Missouri ZIP Code 64106

POD Form 2152
May 1968

EXHIBIT B, ANNEXED TO COMPLAINT.

14882

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 1416
Issued Against

Pent-R Books, Inc.

P. O. Box 61

Brooklyn, N. Y. 11223

and agents or assigns.

P. O. Docket No. PC-W-29

On behalf of:

Lora Gladden
Complaining Addressee

On the 9th day of May, 1969, you received Prohibitory Order No. 1416, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. ~~You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.~~
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, ~~(Address)~~ ~~with the undersigned Postmaster~~, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] KANSAS CITY JUL 3 1969 MO.

Dated: ~~July 3, 1969~~

Postmaster

~~Kansas City, Missouri 64106~~
City State ZIP Code

POD Form 2153
May 1968

14960

EXHIBIT C, ANNEXED TO COMPLAINT.

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 1416
Issued Against

Pont-R Docks, Inc.

P. O. Box 81

Brooklyn, N. Y. 11222

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. DE-IT-29

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

Theodore C. Bland
Postmaster

Kansas City, Missouri 64106
City State ZIP Code

KANSAS CITY JUL 24 1969 MO.

[POSTMARK]

Dated: July 24, 1969

POD Form
May 1968 2154

ANSWER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- PENT-R BOOKS, INC., Defendant.	ANSWER 69 C 1363

Defendant Pent-R Books, Inc., as and for its answer to the complaint herein, hereby:

AS AND FOR A FIRST COMPLETE AND AFFIRMATIVE DEFENSE:

1. Plaintiff has sought and is seeking court orders enforcing postal prohibitory orders only where the advertisement sent was in its judgment pandering, and not where the advertisement is, in its judgment, otherwise. Since only a mailer of sexually oriented materials need go to the tremendous expenses of complying with prohibitory orders, described more fully below, they are being singled out and their property is being discriminatorily confiscated and taxed.

ANSWER

2. As so construed and applied, and in its operation and effect of vesting plaintiff and the Attorney General with the power to make discretionary evaluations of material, 39 U.S.C. §4009 is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the said Fifth Amendment, as well as depriving defendant of the equal protection of the laws under said Fifth Amendment.

AS AND FOR A SECOND COMPLETE AND AFFIRMATIVE DEFENSE:

3. The Postmaster's complaint did not state any cause of action, in that it failed to allege the date of the alleged second mailing and further failed to allege that such alleged mailing was made more than thirty (30) days after defendant's alleged receipt of the alleged prohibitory order.

4. The Postmaster's complaint was thus a nullity and defendant's motion for such dismissal, duly and timely made, should have been granted.

5. Since the complaint was a nullity, all further proceedings thereafter must fall as being without a foundation, void and of no effect.

ANSWER

AS AND FOR A THIRD COMPLETE AND AFFIRMATIVE DEFENSE:

6. As construed and applied, and in their force and effect, 39 U.S.C. §4009 and the rules and regulations promulgated thereto and thereunder, are repugnant to the due process clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its rights under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, as more fully set forth in paragraphs 7-11 inclusive below, a mailer not being given the "full hearing" afforded him in the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, No. 399, Oct. Term, 1969, decided May 4, 1970.

7. In every Post Office hearing, the hearing officer has been and acted as prosecutor, judge, jury, and -- to the extent to which he has introduced in evidence what purport to be records of the Post Office Department -- a witness.

8. The determination that defendant or someone acting in its behalf had violated the prohibitory order was made without the

testimony of any person identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever.

9. Despite repeated demand therefor, no complaining addressee has ever been produced at the administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper request therefor, the Post Office disregarding its own rules and regulations in regard thereto and consistently failing to give any information whatsoever on how its own rules and regulations were being implemented, and has never even inquired as to the willingness of a complaining addressee to be examined.

10. The complaint allegedly issued by a Postmaster or on his behalf had insufficient materials annexed to it to adequately inform defendant of the nature and cause of the accusation, and defendant was not informed of the alleged date of the alleged second mailing.

11. Insofar as plaintiff may rely upon the presumption of 39 U.S.C. §4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

ANSWER

AS AND FOR A FOURTH COMPLETE AND AFFIRMATIVE DEFENSE:

12. The provisions of 39 U.S.C. §4009 require that Prohibitory Orders and Complaints issued thereunder be issued by the Postmaster General.

13. The Postmaster General issued no such Order and served no such Complaint upon defendant herein.

14. The Postmaster General has not delegated his authority to local Postmasters or to others to issue such Orders and Complaints, and if there were or if there be such delegation, such delegation is illegal and unauthorized.

15. If there is any such authority or delegation, the person(s) issuing the Order and Complaint herein had no jurisdiction to do so.

16. On information and belief, the Postmaster General did not determine that the Prohibitory Order issued herein had been or was being violated, and he did not request the Attorney General to make the application to this Court for an order directing compliance.

17. The entire administrative proceeding upon which this action was based is therefore a nullity.

ANSWER

18. This action has been brought without compliance with the underlying statute, and should therefore be dismissed.

AS AND FOR A FIFTH COMPLETE AND AFFIRMATIVE DEFENSE:

19. Defendant, incorporated in 1969, since its inception has published, sold and distributed, through the mails and otherwise, only two items, to wit, a marriage manual entitled "The Photographic Manual of Sexual Intercourse" and, sent mainly to those who have expressed interest in the manual, the motion picture version thereof entitled "Useful Positions of Sexual Intercourse."

20. Upon the outside of all mailing envelopes sent by defendant, there appears a notice advising the recipient of the nature and content of the advertisement contained therein. If the recipient does not want this material, he merely marks the envelope "refused", initials it, and returns it to the postman or drops it in a mail box which he is sure to pass sometime during the day, at defendant's expense, after which defendant removes the addressee's name from its mailing lists.

21. Defendant has never received any complaint from any such addressee.

22. Defendant has received more envelopes marked "refused" than it has received prohibitory orders.

23. Defendant has thus avoided the necessity of an addressee viewing materials which he prefers not to be exposed to, unlike the requirements of 39 U.S.C. §4009, and has avoided the time-consuming necessities inherent in his obtaining prohibitory orders and complaints.

24. If 39 U.S.C. §4009 be applied to defendant, who is engaged solely in publishing, selling and distributing materials protected by the First Amendment, with the warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights.

AS AND FOR A SIXTH COMPLETE AND AFFIRMATIVE DEFENSE:

25. The mailing lists owned by, sold to and rented to defendant are lists of names and addresses of intellectual, mature adults who have previously received from others, similarly situated to defendant, advertising or other materials similar to those disseminated by defendant. They are mailing lists of names of persons

such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses, thus assuring as much as possible that none of the addressees are or will be minors.

26. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap and the names of the same persons frequently appear on both such lists.

27. Defendant has received approximately two hundred thousand Prohibitory Orders. In each and every of those cases wherein a Prohibitory Order has been received by defendant or by others of which defendant is aware, the name of the complaining addressee listed therein has been promptly put upon a special card containing special symbols, and fed through an optical scanner, which translates the symbols into electrical impulses stored on magnetic tape. A computer thereafter automatically eliminates from any mailing list owned by defendant the name of the complaining addressee named in any such prohibitory order. The utilization of the optical scanner and computer by defendant and related clerical procedures has been and continues to be at great cost and expense to defendant of more than $35,000 per year. The name of

the complaining addressee named in the Prohibitory Order herein was thus promptly eliminated from all mailing lists owned or controlled by defendant, its agents and assigns.

28. In view of the many Prohibitory Orders received by defendant, it is physically impossible to visually compare the names of addressees thereon with the names on any list rented by defendant, especially since the names on rented lists are usually listed in random rather than alphabetical order. Since the use of the optical scanner and computer to eliminate names on a list involves the copying of names (by their translation into symbols stored on magnetic tape), and since a rented list may not legally be copied, it is impossible for defendant and others to comply with a Prohibitory Order insofar as the use of a rented list is concerned. Additionally, on occasion, the rented mailing list will not be delivered to defendant, but the owner thereof will insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed.

29. Many mailing lists are not available for purchase, being available for rental only, no matter what the price; when and if sold, the price is many times the rental charge.

30. The optical scanner cannot exercise any judgment. Thus, to the computer, Richard A. Jones and R.A. Jones are two different persons, even if they really be one and the same. Thus, it is impossible to eliminate names from mailing lists if there be the slightest variance from the way it appears on the prohibitory order, or if a different zip code be furnished by the Post Office. To remedy this problem by programming the computer so that all persons at the named address with that last name would not get mail would deprive other persons who live at the same address with the same last name from receiving desired communications from defendant.

31. If the mailing label on the alleged second mailing is different than that on the alleged first mailing, the alleged second mailing was to a rented name.

32. 39 U.S.C. §4009 was not intended to apply to a second mailing made to a name on a a list rented by the sender. If it was intended to so apply, then defendant, who as shown above has exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment if the statute be applied to defendant, since it is impossible and impractical to avoid second mailings to a name on a rented list, and 39

U.S.C. §4009, if so applied and construed, would be unreasonable and would substantially and illegally prohibit the use of the mails.

AS AND FOR A SEVENTH COMPLETE AND AFFIRMATIVE DEFENSE:

33. Defendant is engaged solely in publishing, distributing and selling a publication and its motion picture version which are both protected by the First Amendment.

34. For the computer to print out an entire protestor-free list would cost a minimum of $18,000 per year in addition to the costs noted above, since the list would have to be printed out anew at least once every 30 days.

35. To circumvent such cost, three carbon copies of each print-out are acquired at the comparatively nominal cost of $2 per 1,000 names. Where the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurs because the mailing was made due to the second mailing having been made before a new protestor-free list was printed out, it being impossible and illogical to coordinate dates of mailings with effective dates of prohibitory orders.

36. If 39 U.S.C. §4009 be construed and applied to prohibit such mailings, it is unconstitutional for the reasons set

forth in paragraph 32 above, and because, when considered together with the costs set forth in paragraph 27 above, it is confiscatory, in a First Amendment situation.

AS AND FOR AN EIGHTH AND PARTIAL AFFIRMATIVE DEFENSE:

37. 39 U.S.C. §4009(g) deprives older children of the First Amendment right to receive materials through the mails without governmental interference.

38. It also cannot constitutionally be applied to prevent older children who are or are about to become married from receiving an advertisement for defendant's materials without violating their First Amendment rights.

39. Children in their late teens have been unwillingly deprived of the opportunity to receive materials protected by the First Amendment, but 39 U.S.C. §4009(g) makes the obtaining of written proof thereof by defendant illegal.

40. 39 U.S.C. §4009(g) is further violative of the First Amendment in that after a child becomes 19, and even after he or she becomes 21, governmental interference nonetheless prevents a mailer from mailing to such a person, there existing no machinery

whatsoever for removing such person's name from a prohibitory order, nor is the mailer given notice as to the age of the child prior to a hearing on a complaint.

AS AND FOR A NINTH COMPLETE AND AFFIRMATIVE DEFENSE:

41. The complaint fails to state a cause of action.

AS AND FOR A TENTH COMPLETE AND AFFIRMATIVE DEFENSE:

42. The administrative complaint failed to state a cause of action.

AS AND FOR AN ELEVENTH COMPLETE AND AFFIRMATIVE DEFENSE:

43. If 39 U.S.C. §4009 be applied to alleged mailings to a business concern, as here, it is repugnant to the First Amendment and deprives defendant of its right to free speech and free press under said Amendment.

* * * * * * * *

44. Denies each and every allegation contained in paragraphs FIRST, SECOND, SIXTH, NINTH, TENTH, THIRTEENTH and SIXTEENTH of the complaint.

ANSWER

45. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs FOURTH: EIGHTH, TWELFTH and FIFTEENTH of the complaint.

46. Denies that, as alleged in paragraph FIFTH of the complaint, that the mailing consisted of pandering advertisements, and denies knowledge or information sufficient to form a belief as to whether, as alleged in the said paragraph of the complaint, the addressee believes the said advertisements to be erotically arousing or sexually provocative.

47. Admits that a local Postmaster issued a prohibitory order, respectfully refers the Court to the same for the terms thereof, and otherwise denies each and every allegation contained in paragraph SEVENTH of the complaint.

48. Admits that a local Postmaster issued a complaint, respectfully refers the Court to the same for the terms thereof, and otherwise denies each and every allegation contained in paragraph ELEVENTH of the complaint.

ANSWER

49. Admits that, as alleged in paragraph FOURTEENTH of the complaint, such a determination was made, respectfully refers the Court to the same for the terms thereof, and otherwise denies each and every allegation contained in said paragraph, and denies each and every recital therein.

SCHWARTZ, SCHINDLER & LEVY
Attorneys for Defendant

By_____
A Member of the Firm
295 Madison Avenue
New York, N.Y. 10017

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA, :

Plaintiff, :

: NOTICE OF MOTION

: Civil Action
: No. 69 C 1363

- against -

:

PENT-R-BOOKS, INC.,

:

Defendant.

:

- X

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 26th day of September, 1973, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 7 , 1973

ROBERT A. MORSE
United States Attoreny
Attorney for Defendant
Eastern District of New York

By:

_____
Lloyd H. Baker
Assitant U. S. Attorney

TO:
Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

243a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

September , 19

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit:

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

(Signed) Thomas A. Ziebarth

Thomas A. Ziebarth
Acting Assistant General Counsel
Mailability Division

POD SEAL

POD Form 2159
Sep. 1969

14960

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of Prohibitory Order No. 1436
Issued Against
[redacted]
[redacted]
[redacted]

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. [redacted]

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

Theodore C. Bland
Postmaster

[redacted]
City State ZIP Code

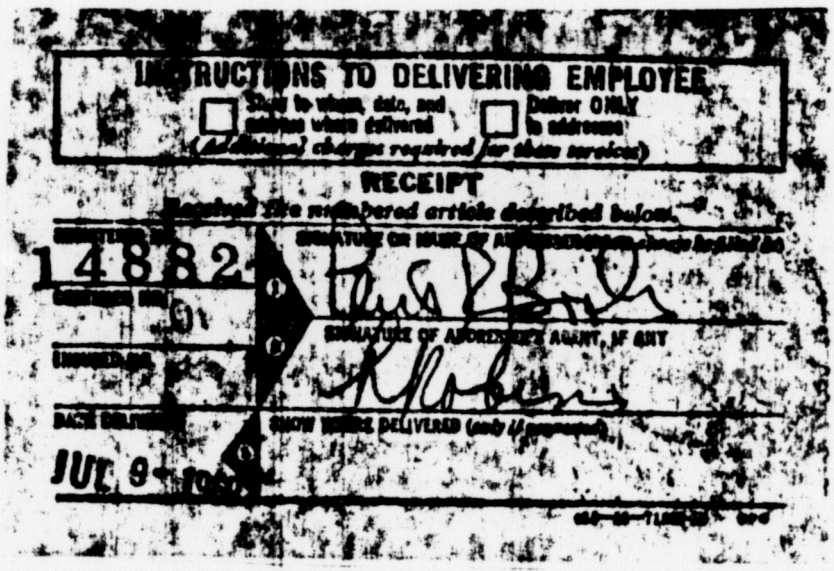
KANSAS CITY JUL 24 1969 MO.

[POSTMARK]

Dated: [redacted]

POD Form 2154
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



INSTRUCTIONS TO DELIVERING EMPLOYEE

RECEIPT

14882

JUL 9

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT 14682

COMPLAINT

In the Matter of Violation of Prohibitory Order No. 1426
Issued Against

Pant-R Books, Inc.

P. O. Box 81

Brooklyn, N. Y. 11223

and agents or assigns.

On behalf of:

Lora Claiden
Complaining Addressee

P. O. Docket No. RS-MC-29

On the 9th day of May, 19 69, you received Prohibitory Order No. 1426, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. [redacted]
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, [redacted] (Address), with the undersigned Postmaster, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

KANSAS CITY JUL 3 1969 MO.

[POSTMARK]

Dated: July 3, 1969

[signature]
Postmaster

Kansas City, Missouri 64106
City State ZIP Code

POD Form 2153
May 1968

247a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

Rec June 13 a 1969
Lora Gladden

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit 55 9545

FIRST CLASS MAIL

LORA GLADDEN
612 HIGHLAND
JOPLIN MO 64801

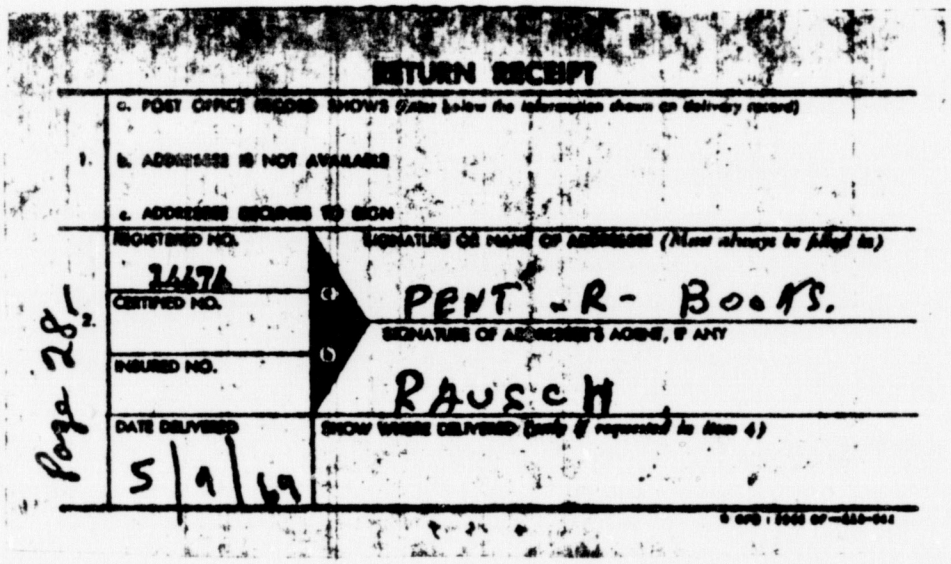
must be over the age of 21 years and sign statement to that effect above, to order. No

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



RETURN RECEIPT

c. POST OFFICE RECORD SHOWS (Enter below the information shown on delivery record)

b. ADDRESSEE IS NOT AVAILABLE

c. ADDRESSEE DECEASED TO SOON

REGISTERED NO. 24676

CERTIFIED NO.

INSURED NO.

DATE DELIVERED 5 | 9 | 59

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

a. PENT - R - BOOKS.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

b. RAUSCH

SHOW WHERE DELIVERED (only if requested in Item 4)

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CERTIFIED COPIES OF U. S. POST OFFICE ORDERS 249a

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

14474

In the Matter of

[redacted]
Mailer

[redacted]

[redacted]

and agents or assigns [redacted]

PROHIBITORY ORDER

NO. [redacted]

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

[redacted]
(Name of Addressee)

[redacted]
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

[redacted]

ADDRESS: [redacted]
(Street)

[redacted]
(City) *(State)* *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[redacted]
Postmaster

[POSTMARK]

City [redacted] State [redacted] ZIP Code

Dated: [redacted]

KANSAS CITY MAY 7 1969 MO.

POD Form 2152
May 1968

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, LONA GLADDEN (Print), addressee [parent of minor addressee] of the enclosed mailing from PENT-R BOOKS INC. (Print) P.O.Box 81 Brooklyn,N.Y. 11223

OR P.O.Box 1555, Grand Central Station NEW YORK N.Y. 10017, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

Lona Gladden — Signature
May 2, 1969 — Date
612 Highland — Street
Joplin — City
Mo. — State
64801 — ZIP Code

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

253a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

***SPECIAL PRE-PUBLICATION PRICE – ONLY $9.98 (Limited Time Only)**

Please check appropriate box!

- ☐ Please ship book and place my name on your mailing list.
- ☐ I am not ordering at this time but place my name on your mailing list.
- ☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

7 LORA GLADDEN 614
612 HIGHLAND
JOPLIN MO 64801

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

Gentlemen:

Enclosed please find $ . . . . . .

[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

----------x

NOTICE OF CROSS MOTION.

Docket No.
69 C 1363

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 69 C 1363

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

AFFIDAVIT OF HERBERT MONTE LEVY

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a

contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make

> application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

AFFIDAVIT OF HERBERT MONTE LEVY

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Postmaster . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

AFFIDAVIT OF HERBERT MONTE LEVY

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing

can happen to a mailer unless and until he violates a Court order. it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by tne Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

AFFIDAVIT OF HERBERT MONTE LEVY

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without

AFFIDAVIT OF HERBERT MONTE LEVY

any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

This case should also be dismissed for lack of prosecution, pursuant to Rule 41(b). It was commenced in 1969. An answer was duly filed and served by me. However, there was no activity in this case whatsoever until 1971, when a pretrial conference was held, and an order entered directing the parties to attempt to settle. Immediately thereafter, I began settlement negotiations with Lloyd Baker, Esq., Assistant United States Attorney in charge of this case, and we reached a satisfactory settlement agreement, subject to approval by his superiors in Washington. Naturally, we agreed that no proceedings would be had in this case unless and until settlement negotiations had fallen through. However, the Government took a completely inordinate amount of time as to settlement. Thus, it was not until October 2, 1973 that the Government in Washington finally turned down my settlement proposals, reciting that it would "settle" only by the entry of consent judgments -- which is no settlement at all, but a requirement of unconditional surrender. Thus, the Government has been responsible for a delay from 1969 to 1973, or some 4 years. True, settlement negotiations would normally not be counted in determining whether there had been a fatal lack of prosecution, but under the circumstances, where it took 2 years for the Government to make up its mind that it finally

rejected any and all settlement proposals, after 2 years of complete inactivity, we submit that this total disinterest in the case amounts to lack of prosecution, clearly shows lack of prosecution, and that the case should accordingly be dismissed.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

AFFIDAVIT OF HERBERT MONTE LEVY

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

AFFIDAVIT OF HERBERT MONTE LEVY

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed)

and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory orders." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were the purported certification in accordance with the provisions of the Rule, it would be defective for an additional reason, to wit, the fact that the certification completely fails to specify which documents are being certified. The simple fact of the matter is that the certification has not been filled out, and is a completely blank and meaningless certification, reading as follows:

"I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: " -- but these records are never further

identified. Hence, it is utterly impossible to tell to what the certification refers. The certification may refer to the purported records filed in this particular case, or it might be a completely erroneous certification relating to a totally different case. There is no reason to believe one more than the other. In the complete absence of any identification of which documents are being certified, the certification must fall. And in the absence of any proof by affidavit, there is simply no evidence before this Court on this motion for summary judgment, and the Government's motion should be denied, and the complaint dismissed.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the order was issued by a local Postmaster, who had no authority to issue such an order. If indeed there was any administrative regulation

authorizing the delegation to a local postmaster of the power to issue a prohibitory order, then, we submit, there is simply no authority in law for such delegation to have been made, where, as here, the statute expressly requires the Postmaster General to issue the order.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of

the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, it is quite clear that the presumption does not operate, since, according the Government the benefit of every doubt and assuming for purposes of this argument solely that the evidence is admissible, the most that the Government alleged file shows is that the prohibitory order was received by defendant on May 9, 1969 and that the second alleged mailing was received by the addressee on June 13, 1969 -- being a difference of less than 60 days between such two dates. Thus, the presumption cannot operate, and in the absence of any proof whatsoever other than that to be gained by the use of the presumption, it is quite clear that the Government has not made out a violation of the prohibitory order, and that summary judgment should be granted to the defendant, dismissing the complaint.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government,

in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)), as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the

type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

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> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged

date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean

hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced

with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The alleged receipt purporting to show the date of receipt, purportedly signed by the complaining addressee, does not clearly show the date it was received. It merely recites "received," or a word or words to such effect. The next line sets forth the name of the addressee. This may well show the date the Post Office received the material from the complaining addressee, rather

than the date that the complaining addressee received the second mailing from the defendant. It certainly is not proof that this was the date of receipt by the complaining addressee of the defendant's second alleged mailing.

The proof of date of receipt of the second alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply no signature to even vouch for such a date of receipt -- even by the Post Office.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, the order was issued by a local Postmaster.

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There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Joplin, Missouri , the address to which the first mailing was made, but out of Kansas City, Missouri . We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

AFFIDAVIT OF HERBERT MONTE LEVY

For the reasons stated in this [illegible]t, as well as for the reasons set forth in [illegible]' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19[illegible]

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
Theodore C. Bland
Kansas City, Mo. 64108

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: Pent-R Books, Inc.
ads. P.O. (Gladden)
P.O. Docket No. R8-KC-29

DATED: July 23, 1969

Client has received the Complaint in the above matter, dated July 3, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionality both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in _____ ads. P.O. (_____), P.O. Docket No._____.] We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here ~~is~~ (are) ~~(nullity)~~ (nullities). If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies <u>a fortiorari.</u>

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the effective date of the Prohibitory Order, the Complaint fails to state a cause of action. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. No copies of either mailing were enclosed, only copies of the envelopes.

Herbert Monte Levy

LETTER, CONSIDERED AS A NOTICE OF APPEAL, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

September 2, 1969

William Lawrence, Esq.,
Assistant General Counsel
Post Office Department
Availability Division
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Gladden)
P.O. Docket No. R8-KC-29

" " ads. P.O. (Kiyak)
P.O. Docket No. NK-69-7339-138

" " " ads. P.O. (Messer)
P.O. Docket No. R5-P-277

" " " ads. P.O. (Sellers)
P.O. Docket No. PH-69-4444-69

" " ads. P.O. (Walsh)
P.O. Docket No. NK-69-7207-134

TRU/ART Distributing Corp. ads P.O. (Daum)
P.O. Docket No. BOS-P-69-24

Again, please consider this as a notice of appeal in each of the above matters for the hearing denials therein, and a brief in support thereof, incorporating my prior arguments by reference.

This time, I am particularly appalled by the hearing denial in Kiyak, where the demand for hearing was mailed to Newark 12 days after receipt of the complaint. This means it took at least four days for the letter to arrive — I can drive to Newark from my office in 25 minutes.

LETTER, CONSIDERED AS A NOTICE OF APPEAL, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

I am also somewhat puzzled by the hearing denial in Messer, dated August 20, 1969, inasmuch as an Order had already been made dated August 1st, which I appealed to you in my letter of August 11, 1969.

Can't we clear up all these items?

Sincerely,

Herbert Monte Levy

HML:bol

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #

69 C 1363

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint.

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected

by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of

violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working

3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory

orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were

handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have

been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt).

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

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A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant.

They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those

on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use

of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus,

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation

and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

AFFIDAVIT OF RICHARD S. SCHWARTZ

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued - one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Coldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Coldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

AFFIDAVIT OF RICHARD S. SCHWARTZ

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $500,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe tht we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right

of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

AFFIDAVIT OF RICHARD S. SCHWARTZ

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows: 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

However, in this case, all that was annexed to the complaint was copies of mailing envelopes.

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived defendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be

AFFIDAVIT OF RICHARD S. SCHWARTZ

granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 24[illegible]
Qualified in [illegible] County
Commission Expires March 30, 19[illegible]75

ABOUT YOUR SUBSCRIPTION

Your subscription to POPULAR PHOTOGRAPHY is maintained on one of the world's most modern, efficient computer systems, and if you're like 99% of our subscribers, you'll never have any reason to complain about your subscription service.

We have found that when complaints do arise, the majority of them occur because people have written their names or addresses differently at different times. For example, if your subscription were listed under "William Jones, Cedar Lane, Middletown, Arizona," and you were to renew it as "Bill Jones, Cedar Lane, Middletown, Arizona," our computer would think that two separate subscriptions were involved, and it would start sending you two copies of POPULAR PHOTOGRAPHY each month. Other examples of combinations of names that would confuse the computer would include: John Henry Smith and Henry Smith; and Mrs. Joseph Jones and Mary Jones. Minor differences in addresses can also lead to difficulties. For example, to the computer, 100 Second St. is not the same as 100 2nd St.

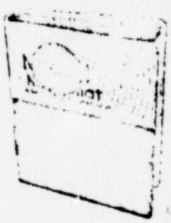
So, please, when you write us about your subscription, be sure to enclose the mailing label from the cover of the magazine—or else copy your name and address exactly as they appear on the mailing label. This will greatly reduce any chance of error, and we will be able to service your request much more quickly.

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937.	The Leica Book by Kisselbach	9.95
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132.	Minox Manual by Cooper	7.95
675.	Retina Reflex Way by Mannheim	11.95
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No.____ No.____ No.____

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City State Zip

Orders for $10.00 or more shipped postpaid in U.S.A. & Canada. Add 10% for overseas delivery (except APO/FPO). These manuals are also available from your favorite photo dealer or bookstore.

NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley*: Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer, John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Hue, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T Co.; Marcello Ablaza, official photographer to the president of the Phillippine Dr. Wesley Clark, dean of the School Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image.*

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland.*

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ⊙

MEMORANDUM AND ORDER BY DOOLING, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

: 69 C 1363

-against- (GLADDEN)

:

PENT-R-BOOKS, INC., MEMORANDUM

: and

Defendant. ORDER

- - - - - - - - - - - - - - - - - - - -X

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606, and 72 C 609 , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

MEMORANDUM AND ORDER BY DOOLING, J.

was ignored. It was mailed to the Postmaster at Kansas City, Missouri, , from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York

July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

69 C 1363
(GIADDEM)
JUDGMENT

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC., its agents and assigns (1) refrain from any further mailings to LORA GLADDEN, 512 HIGHLAND, JOPLIN, MISSOURI 64801,

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately abstain from any

JUDGMENT

sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 29, 1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 580.

DOCKET ENTRIES

U.B.A. v. PENT-R BOOKS, INC.

72C 580

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS$
5-26-72	Summons returned & filed. srvd 5-25-72.	2
9-27-73	Pltff's notice of motipn ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	5/6
7-24-74	By DOOLIN—J— Memorandum and order dtd 7-24-74 granting pltff's motion for summary judgmer and denying deft's motion for summary judgment filed.	7
7-24-74	JUDGMENT dtd 7-24-74 granting permanent injunction against deft filed.(p/c mailed to attys)	8
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

COMPLAINT

Civil Action
No.

- X

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about April 16, 1969, defendant mailed or caused to be mailed through the U. S. mail to G. Harter, Davenport, Iowa (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

COMPLAINT

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on April 16, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 2471, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about June 25, 1969, in violation of Prohibitory Order No. 2471, defendant, or someone acting on its behalf, mailed or caused to be mailed through the

COMPLAINT

United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On July 23, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 2471, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or about the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On August 18, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 2471.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 2471, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- X

NOTICE OF MOTION

72 C 580

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 5th day of October, 1973, at ~~9:15~~ 4:30 o'clock in the ~~fore~~afternoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

_____ 19 _____

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit:

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

_____ 19 _____

C E R T I F I C A T I O N

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POD
SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

_____ 19 _____

C E R T I F I C A T I O N

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IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 2471
Issued Against

Pent-R Books

Box 81

Brooklyn, New York 11223

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. 88-DM-57

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

JOHN P. [illegible], POSTMASTER

BY Earl L. Curtis ASST. PM
Postmaster

Des Moines, Iowa 50318
City State ZIP Code

[POSTMARK]

Dated: August 18, 1969

DES MOINES, IOWA
AUG 18 1969
USPO

POD Form
May 1968 2154

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

JUL 2 [illegible] 1959

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

1 Bert R Books

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

2 A. Tartaglia

SHOW WHERE DELIVERED (*only if requested*)

3

55—16—71648-10 GPO

2153 – 57

Docket 57

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

STREET AND NO. OR P.O. BOX

POSTMASTER
~~POSTAL SERVICES CENTER~~
DES MOINES, IOWA 50318

POST OFFICE, STATE, AND ZIP CODE

POD Form 3811 Apr. 1967 55—16—71648-10

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of Prohibitory Order No. 2471
Issued Against

Pent R Books, Inc.

Box 31

Brooklyn, N.Y. 11223

and agents or assigns.

On behalf of:

G. Hester
Complaining Addressee

P. O. Docket No. 68-BM-57

On the 18th day of April, 1969, you received Prohibitory Order No. 2471, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. ~~You or your agents or assigns have sold, lost, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.~~
4. ~~Other (specify):~~

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, ~~in the Office of the Regional Counsel, Post Office Department~~ with the undersigned (Address)

Postmaster, Des Moines, Iowa 50318, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK]

JUL 23 1969

Dated: 7-23-69

Postmaster

Des Moines, Iowa 50318
City State ZIP Code

POD Form 2153
May 1968

333a

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FENT-R BOOKS INC.
P. O. BOX 81
BROOKLYN, N. Y. 11223

JUNE 25, 1969

G. Harter

DES MOINES, IOWA JUN 27 1969 USPO

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit # 9546

2nd Notice

Request for prohibitory order

FIRST CLASS MAIL

G HARTER
1511 E HIGH ST
DAVENPORT IA 52803

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.L.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE!

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

OUR GUARANTEE

TRY IT . . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading the book you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE! ONLY $9.98

SPECIAL PRE-PUBLICATION LIMITED TIME OFFER

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENT-R BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

..... signature

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



BLACK & WHITE PHOTOGRAPHS
BETTER MARITAL PARTNER

Too many married couples are in the doldrums of on again off-again "quickie" unembellished intercourse with no variations and no experimentations! This book will take you out of the sexual rut and into the sunshine of fresh new youthful exciting sexual activity!

IMAGINE YOURSELF CONSISTENTLY SATISFYING YOUR SEX PARTNER FAR BEYOND HER-OR-YOUR WILDEST EXPECTATIONS!

Why not enjoy all the wholesome, healthy thoroughly satisfying sexual delights that are available to you and your sexual partner? It's all so easy and so natural provided you forget the prejudices and fallicies of the bygone eras and recognize the fact that just as there is more to life than eating and sleeping, so there is more to sex than mere "quickie" intercourse! And this is precisely the point this book brings home to you with absolute clarity, detail and the frankest most up-to-date and modern information that has ever been available to the adult general public!

THIS IS NOT A LONG--WINDED BOOK OF DULL THEORY!

The "Photographic Manual of Sexual Intercourse" is a clear, live, dynamic, detailed **"HOW TO DO IT"** manual of step by step practical instruction. It teaches you, in plain language, direct and to the point, precisely what to do and how and when to do it to increase not only your own pleasure and satisfaction, but the pleasure and satisfaction of the one you love!

THIS BOOK HAS ONE MAIN PURPOSE

This book has one main purpose, to teach you how t derive the utmost pleasure, excitement, sensation ecstasy and satisfaction from sexual intercourse. It definitely NOT written for persons seeking cheap thrill or those seeking to 'ogle" at pictures of persons engage in sexual intercourse!

WHAT THIS BOOK WILL DO FOR YOU

1) You will develop a healthy life-long attitude toward sex! Ha healthy attitude will improve your general health both ment and physical!
2) You will learn how to become a successful "lover-husband which will help you to achieve greater success and happines in every aspect of your business and personal life!
3) You will learn how to experience maximum sexual satisfac tion from the sex act.
4) You will learn how to correct any problem of sexual incompatibility in your marriage! You will learn what cause certain sexual problems and complications and how to avoid and deal with them.
5) You will learn the secret of enjoying sex-love happiness in the years ahead. How to keep the fire burning and how to keep your sex life from becoming dull and monotonous!

You will learn numerous ways to prolong the act of intercourse You will learn how to help your wife to achieve a fuller orgasm How to arouse her to new found passion and she will learn to arouse you to a new vitalized sexual relationship. You and your wife will both learn through words and photographs what to do and what NOT to do to become a more accomplished lover and sex partner.

And Now, you can also learn with the aid of text and photographs, how to obtain complete sexual satisfaction even **WHEN INTERCOURSE IS NOT POSSIBLE!**

This is the first time that a book has been offered to the general adult public that offers complete detailed chapters on **"FEMALE ORAL-ANAL SEXUALITY"** . . . **"MALE ORAL-ANAL SEXUALITY"** . . . **"SATISFYING SUBSTITUTES FOR SEXUAL INTERCOURSE"** . . . **"SEXUAL INTERCOURSE FOR THE OLD, ILL AND HANDICAPPED"!**

Yes, this is a complete guide to a happier sex-love life for married couples! This is the **HOW-TO-DO-IT** book in the marriage and sexual arts! It makes every other text on the subject obsolete!

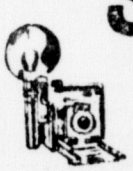
SEXUAL KNOWLEDGE IS SEXUAL POWER!

The vivid detailed photographs in this book show with utmost clarity how to adjust postures for the best possible matching of organs, how to make the sexual side of marriage more vibrant by introducing a variety of caresses and positions into the sexual act. Men and women with sexual knowledge are men and women with power to bring satisfaction and fulfillment to their love partners as well as to themselves. "The Photographic Manual Of Sexual Intercourse" will give you the knowledge and power to master all the wonders and aspects of sex. And remember, it is all available to you NOW! All you have to do is use the enclosed order card!

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

NOW AVAILABLE FOR THE FIRST TIME ANYWHERE!

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"



AMERICA'S FIRST COMPLETE "SEX COURSE" IN ONE VOLUME!

NOW FOR THE FIRST TIME, THE MYSTERY OF SEX IS UNLOCKED THROUGH THE AID OF OVER 150 ACTUAL PHOTOGRAPHS OF A LIVE MAN AND A LIVE WOMAN TOGETHER ENGAGED IN SEXUAL INTERCOURSE POSITIONS!

DOES AMERICA NEED A

PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL?

PENT-R BOOKS INC. P.O. BOX 1555, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear . . . "Don't worry, she has time" . . . or . . . "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the stoop, the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians subtle jokes. And above all shall we allow our youth to hear every old-wives-tale, every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back . . . for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness is disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something private, something personal, something one person does not quickly reveal to another. In far too many cases, a person remains silent, remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarital pregnancy is at it's highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one topic in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL, we ask again? We think yes, most definitely yes and we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes . . . because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indespensible aids to learning in just about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to the reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well or accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose is to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her own conclusions. We feel that to publish our book "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" without photographs would be a dis-service to our readers and would confuse rather then enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 21 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adult who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even with years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexual pleasures, complete sexual satisfaction and to inspire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form for your convenience.

We suggest that you order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE", read it, show it to your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediate refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won't get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain..

With my sincere personal good wishes,

Ronald Ahdin

Ronald Ahdin

P.S.

This book cannot now be obtained in any book store or from any other mail order firm. It is presently only available from the publisher, Pent-R Books Inc.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

A BREAKTHROUGH IN SEX EDUCATION

No dolls, no drawings, no illustrations, no pencil sketches, no partially obscured over-printed photographs, no tracings where one sheet must be placed upon another, no men and women wearing skin tights, no tricks where men and women appear in the photographs separately! Now, for educational purposes only, over 100 coital positions are clearly photographed for instruction purposes in over 150 large clear photographs of a real living nude man and a real living nude woman, a married couple, together engaged in sexual intercourse positions with accompanying descriptive text in the most sophisticated, modern and up-to-date sex manual ever published!

AVAILABLE FOR THE FIRST TIME TO THE ADULT GENERAL PUBLIC!

This brand new just published giant compendium of sex you will find the most informative, educational, instructive, eye-opening and mind clearing sexual manual that you have ever seen or read, BAR NONE! It offers the frankest, clearest, most detailed and explicit information through words and actual photographs on **"HOW TO ENGAGE IN SEXUAL INTERCOURSE"** that has ever been written! Over 100 coital positions are frankly described in plain language and photographed in over **150 FULL COLOR AND BLACK AND WHITE DETAILED PHOTOS!**

THERE HAS NEVER BEEN A BOOK LIKE THIS BEFORE!

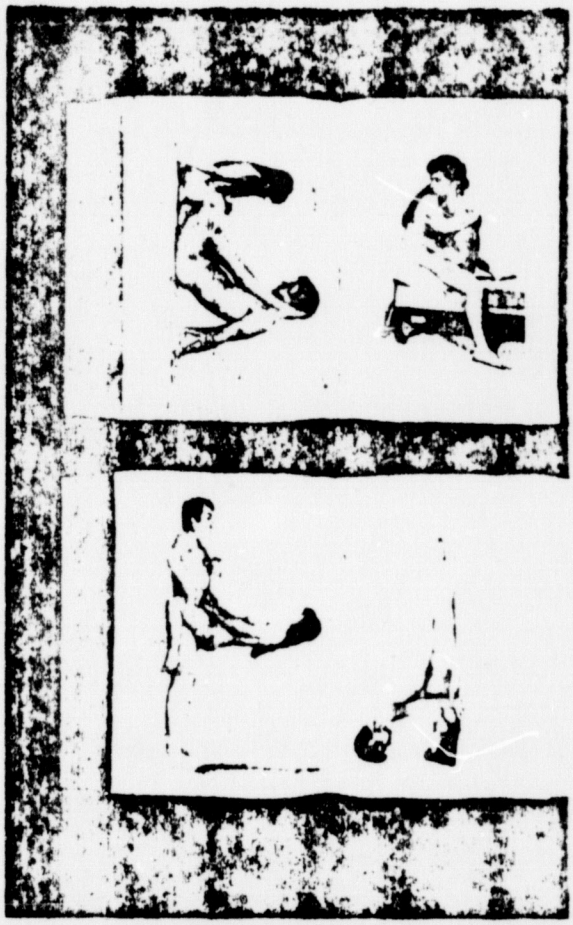
Many will call **"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"** America's First Sex Course." Because for you and your wife, that is exactly what it can be. A step by step specific course in words and clear concise photographs of how to engage in the many forms of physical love and sexual intercourse! It can turn dull confused routine "quickie" sex into exciting sexual episodes which continue to improve each time and provide far greater degrees of pleasure and satisfaction then you or your wife ever thought possible!

Here at last, are the techniques which transform the staleness apathy and boredom of the marital act into a series of invigorating refreshing, fulfilling experiences . . . each more thrilling than the last!

The Photographic Manual Of Sexual Intercourse will teach you step by step, in minute detail, every touch, every movement, every kiss, every sensitive area of the body, every technique available to you for giving your mate and yourself new heights of sexual enjoyment and contentment. More, in fact, than you ever thought possible!

NOW! Learn from down to earth solid straight no-punches pulled plain language facts and over 150 clear educational Full Color and Black and White photographs all that you will ever need to know about the many varied aspects of sexual intercourse!

THIS BOOK IS SO FANTASTIC, SO MODERN, INFORMATIVE, EDUCATIONAL, SO COMPLETE, THAT IT WILL BE THE LAST BOOK ON SEX THAT YOU WILL EVER BUY BECAUSE IT WILL BE THE ONLY BOOK ON SEX THAT YOU WILL EVER NEED!



OVER 150 FULL COLOR AND SHOW YOU HOW TO BE

Now for the first time in any book you can see with your own eyes, in large full color and black and white actual photographs the best positions to use for a wide variety of special purposes and sensual effects!

- **Discover the positions that narrows the vaginal opening, giving the man more stimulation!**
- **Learn the position that automatically forces the woman's thighs to add to penile stimulation!**
- **Discover the positions which most directly excite the clitoris!**
- **Find out what position holds the male organ after climax, preventing rapid contraction of the organ!**
- **Learn the position that allows the penis to penetrate to the neck of the uterus while at the same time providing even more sensation from the caressing touch of the scrotum moving upon the woman!**
- **Learn the position that holds a partial erection most firmly!**

This is only a partial list of what the photographs and text will teach you in this amazing new book!

338a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*FIRST EDITION SPECIAL OFFER - $9.98 (Limited Time Only)

Please check appropriate box!

☐ Please ship book and place my name on your mailing list.
☐ I am not ordering at this time but place my name on your mailing list.
☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

106 G HARTER **
1511 E HIGH ST **
DAVENPORT IA 52803

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOO
P.O. Box 155
Grand Centra
New York, N

Gentlemen:

Please send me
of "The Photo
course" at the
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may return the
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First Edition Special price of only
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liate refund of the purchase price.
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n: Gold-Stamped Casebound
ne only $12.98
d $_____ ☐ Cash ☐ Check
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d a $2 Deposit. Please ship C.O.D.
Enclose full payment and save
.D. fees!!

2471

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 43814 38

CERTIFIED NO.

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

Peter R. Bolt

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

Ethel Pansd

DATE DELIVERED APR 18 1969

SHOW WHERE DELIVERED (*only if requested*)

c55—16—71518-10 GPO

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER JOHN P. MC NERNEY POSTMASTER

STREET AND NO. OR P.O. BOX ADMINISTRATIVE SERVICES
DES MOINES, IOWA 50318

POST OFFICE, STATE, AND ZIP CODE

POD Form 3811 Apr. 1957 c55—16—71569-10

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

[illegible] Books, Inc.

Mailer

Post Office Box 81

Brooklyn, New York 11229

and agents or assigns

PROHIBITORY ORDER

NO. 2471

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

[illegible]

1511 [illegible] High St

[illegible] IA 52803

(Name of Addressee)

(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [redacted]

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

[illegible]. Dale Harter

ADDRESS: 1511 East High Street

(Street)

Davenport (City) Iowa (State) 52803 (ZIP Code)

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

Dated: April 16, 1969

John P. McEleney

Postmaster

Des Moines, Iowa 50318

City State ZIP Code

By

Ray H. Francisco
Chief, Administrative Services
Postal Services Center

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

PUBLIC LAW 90-206 December 16, 1967

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.".

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, G. HARTER (Print), addressee [parent of minor addressee] of the enclosed mailing from PENT-R-BOOKS, INC. (Print), PO BOX 1555 - GRAND CENTRAL STA. NEW YORK, NEW YORK 10017, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

R. Gale Harter — Signature
4/9/69 — Date
1511 - EAST HIGH ST — Street
DAVENPORT — City
IOWA — State
52803 — ZIP Code

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE!

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that very few other books offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

OUR GUARANTEE

TRY IT . . . DON'T BUY IT . . . With our money back offer! We have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book we make this simple, straightforward guarantee to you. Order a copy of "**THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE**." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. Please act today! A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

FIRST EDITION SPECIAL OFFER Limited Time Only!

The regular price of "**THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE**" is $12.98. This is the price many book stores throughout the country and many mail order firms are selling this book for. To the people who were unable to take advantage of our special pre-publication $9.98 offer, we are making this "First Edition Special Offer" for a limited time only. You may purchase "The Photographic Manual Of Sexual Intercourse" with Handsome Kivar Binding for only $9.98 and save $3 for a limited time only. This special offer may not be repeated again! You may have one chance and one chance only to take advantage of this tremendous offer. Please order today! We have books in stock for immediate shipment. Our money back guarantee of course still applies!

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE ONLY $9.98

First Edition Special Limited Time Only

- 256 Pages Printed On The Finest Heavy-Weight Pure White Bond And High Gloss Enameled Paper!
- Handsome Kivar Binding (Special Deluxe Binding Also Available)
- Over 150 Actual Photographs In Black & White And Full Color!
- 40 Full Page Photos & 16 Full Page - Full Color Photos!

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER!
No Books Will Be Shipped To Unmarried Minors!

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE.
(C.O.D. Orders Accepted But Must Be Accompanied By A $2 Deposit.)

PENT-O-BOOKS INC. P.O. BOX 1855
Grand Central Station, New York, N.Y. 10017

Gentlemen:

Please rush me in plain sealed wrapper _____ copies of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE".

- [ ] Regular Edition: Handsome Kivar Binding $9.98
- [ ] Deluxe Edition: Gold-Stamped Casebound Library Volume $12.98
- [ ] I have enclosed $ _____ [ ] Cash [ ] Check [ ] Money Order
- [ ] I have enclosed $2. Deposit. Please ship C.O.D.

I understand that if I am not completely satisfied, I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below.

signature

Print Name .....

Address .....

City ..... State ..... Zip .....

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



ACK & WHITE PHOTOGRAPHS BETTER MARITAL PARTNER!

Too many married couples are in the doldrums of on-again off-again "quickie" unembellished intercourse with no variations and no experimentations! This book will take you out of the sexual rut and into the sunshine of fresh new youthful exciting sexual activity!

IMAGINE YOURSELF CONSISTENTLY SATISFYING YOUR SEX PARTNER FAR BEYOND HER-OR-YOUR WILDEST EXPECTATIONS!

Why not enjoy all the wholesome, healthy thoroughly satisfying sexual delights that are available to you and your sexual partner? It's all so easy and so natural provided you forget the prejudices and fallacies of the bygone eras and recognize the fact that just as there is more to life than eating and sleeping, so there is more to sex than mere "quickie" intercourse! And this is precisely the point this book brings home to you with absolute clarity, detail and the frankest most up-to-date and modern information that is available to the adult general public!

THIS IS NOT A LONG-WINDED BOOK OF DULL THEORY!

The "Photographic Manual of Sexual Intercourse" is a clear, live, dynamic, detailed "HOW TO DO IT" manual of step by step practical instruction. It teaches you, in plain language, direct and to the point, precisely what to do and how and when to do it to increase not only your own pleasure and satisfaction, but the pleasure and satisfaction of

THIS BOOK HAS ONE MAIN PURPOSE

This book has one main purpose, to teach you how to derive the utmost pleasure, excitement, sensation, ecstasy and satisfaction from sexual intercourse. It is definitely NOT written for persons seeking cheap thrills or those seeking to "ogle" at pictures of persons engaged in sexual intercourse!

WHAT THIS BOOK CAN DO FOR YOU

1) It can help you develop a healthy life long attitude toward sex! This healthy attitude can improve your general health both mental and physical!
2) It can help you learn how to become a successful "lover husband" and help you to achieve greater success and happiness in every aspect of your business and personal life!
3) It can help you learn how to experience maximum sexual satisfaction from the sex act.
4) It can help you learn how to correct any problem of sexual incompatibility in your marriage! You can learn what causes certain sexual problems and complications and how to avoid and deal with them.
5) It can help you learn the secret of enjoying sex-love happiness in the years ahead. How to keep the fire burning and how to keep your sex life from becoming dull and monotonous!

You can learn numerous ways to prolong the act of intercourse. You can learn how to help your wife to achieve a fuller orgasm. How to arouse her to new found passion and how she can learn to arouse you to a new vitalized sexual relationship. You and your wife can both learn through words and photographs what to do and what NOT to do to become a more accomplished lover and sex partner.

And Now you can also learn with the aid of text and photographs, how to obtain complete sexual satisfaction even **WHEN INTERCOURSE IS NOT POSSIBLE!**

This is one of the very few books that offers to the general adult public complete detailed chapters on **"FEMALE ORAL-ANAL SEXUALITY"** . . . **"MALE ORAL-ANAL SEXUALITY"** . . . **"SATISFYING SUBSTITUTES FOR SEXUAL INTERCOURSE"** . . . **"SEXUAL INTERCOURSE FOR THE OLD, ILL AND HANDICAPPED"!**

Yes, this is practically a complete guide to a happier sex-love life for married couples! This is the **HOW-TO-DO-IT** book in the marriage and sexual arts! It makes most other text on the subject obsolete!

SEXUAL KNOWLEDGE IS SEXUAL POWER!

The vivid detailed photographs in this book show with utmost clarity how to adjust postures for the best possible matching of organs, how to make the sexual side of marriage more vibrant by introducing a variety of caresses and positions into the sexual act. Men and women with sexual knowledge are men and women with power to bring satisfaction and fulfillment to their love partners as well as to themselves. "The Photographic Manual Of Sexual Intercourse" will give you the knowledge and power to master all the wonders and aspects of sex. And remember, it is all available to you NOW! All you have to do is use the enclosed order card!

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

A BREAKTHROUGH IN SEX EDUCATION

No dolls, no drawings, no illustrations, no pencil sketches, no partially obscured over-printed photographs, no tracings where one sheet must be placed upon another, no men and women wearing skin tights, no tricks where men and women appear in the photographs separately! Now, for educational purposes only, over 100 coital positions are clearly photographed for instruction purposes in over 150 large clear photographs of a real living nude man and a real living nude woman, a married couple, together engaged in sexual intercourse positions with accompanying descriptive text in the most sophisticated, modern and up-to-date sex manual ever published!

AVAILABLE FOR THE FIRST TIME TO THE ADULT GENERAL PUBLIC!

This brand new just published giant compendium of sex you will find one of the most informative, educational, instructive, eye-opening and mind clearing sexual manuals that you have ever seen or read. It offers the frankest, clearest, most detailed and explicit information through words and actual photographs on "HOW TO ENGAGE IN SEXUAL INTERCOURSE" that has probably ever been written! Over 100 coital positions are frankly described in plain language and photographed in over 150 FULL COLOR AND BLACK & WHITE DETAILED PHOTOS!

THERE HAS NEVER BEEN A BOOK LIKE THIS BEFORE!

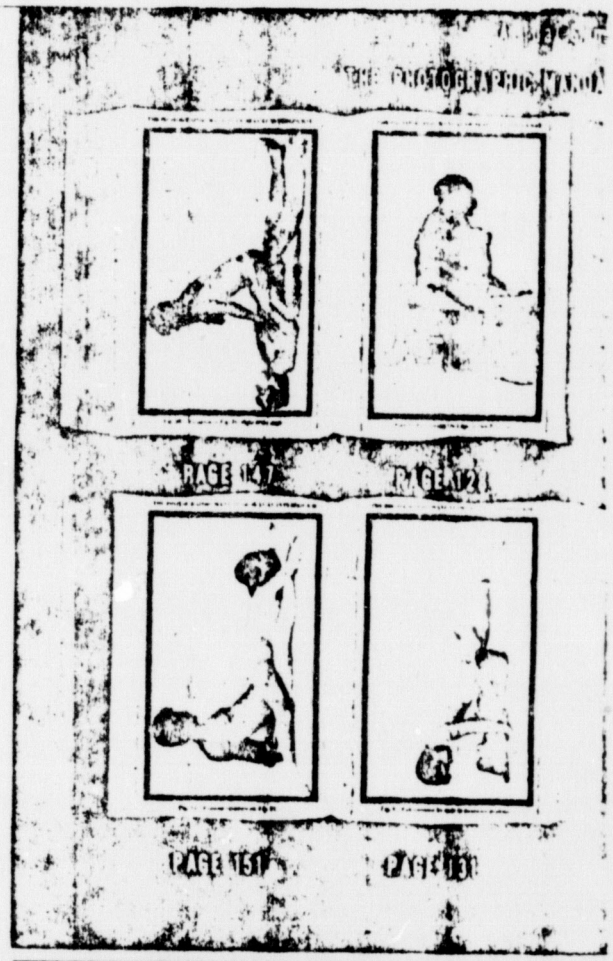
Many will call "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" America's First Sex Course." Because for you and your wife, that is exactly what it can be. A step by step specific course in words and clear concise photographs of how to engage in the many forms of physical love and sexual intercourse! It can turn dull confused routine "quickie" sex into exciting sexual episodes which continue to improve each time and provide far greater degrees of pleasure and satisfaction than you or your wife ever thought possible!

Here at last, are the techniques which can transform the staleness apathy and boredom of the marital act into a series of invigorating refreshing, fulfilling experiences . . . each more thrilling than the last!

The Photographic Manual Of Sexual Intercourse will teach you step by step, in minute detail, each touch, each movement each kiss, each sensitive area of the body, each technique available to you for giving your mate and yourself new heights of sexual enjoyment and contentment. More, in fact, than you ever thought possible!

NOW! Learn from down to earth solid straight no-punches pulled plain language facts and over 150 clear educational Full Color and Black and White photographs the unusually helpful facts you should know about the many varied aspects of sexual intercourse!

THIS BOOK IS SO FANTASTIC, SO MODERN, INFORMATIVE, EDUCATIONAL, SO COMPLETE THAT IT WILL BE THE LAST BOOK ON SEX [illegible] WILL EVER BE BROADSIDED WITH. [illegible]



OVER 150 FULL COLOR AND B
SHOW YOU HOW TO E

Now for the first time in any book you can see with your own eyes, in large full color and black and white actual photographs the best positions to use for a wide variety of special purposes and sensual effects!

- **Discover the positions that narrows the vaginal opening, giving the man more stimulation!**
- **Learn the position that automatically forces the woman's thighs to add to penile stimulation!**
- **Discover the positions which most directly excite the clitoris!**
- **Find out what position holds the male organ after climax, preventing rapid contraction of the organ!**
- **Learn the position that allows the penis to penetrate to the neck of the uterus while at the same time providing even more sensation from the caressing touch of the scrotum moving upon the woman!**
- **Learn the position that holds a partial erection most firmly!**

This is only a partial list of what the photographs and text will teach you in this amazing new book!

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear . . . "Don't worry, she has time" . . . or . . . "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the stoop, the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle jokes. And above all shall we allow our youth to hear every old-wives-tale, every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back . . . for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness is disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something private, something personal, something one person does not quickly reveal to another. In far too many cases, a person remains silent, remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarital pregnancy is at it's highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one topic in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL we ask again? We think yes, most definitely yes and we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes . . . because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indespensible aids to learning in just about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to the reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well or accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose is to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her own conclusions. We feel that to publish our book "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" without photographs would be a dis-service to our readers and would confuse rather then enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 21 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adult who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even with years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexual pleasures, complete sexual satisfaction and to inspire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form for your convenience.

We suggest that you order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE", read it, show it to your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediate refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won't get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain.

PENT-R BOOKS INC. P.O. BOX 1555,
GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

With my sincere personal good wishes,

Ronald Olsen

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CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

***SPECIAL PRE-PUBLICATION PRICE – ONLY $9.98 (Limited Time Only)**

Please check appropriate box!

☐ Please ship book and place my name on your mailing list.
☐ I am not ordering at this time but place my name on your mailing list.
☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

34 G HARTER
1511 E HIGH ST
DAVENPORT IA 52803 381

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

PENT-R BOOKS INC.

Gentlemen:

Enclosed please find $ .....

[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

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CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS
U. S. POSTAGE
PAID
6c
Permit # 9546

DES MOINES, IOWA
APR
16
1969
USPO

Request for prohibitory order

FIRST CLASS MAIL

G HARTER
1511 E HIGH ST
DAVENPORT IA 52803

581

be over the age of 21 years and sign statement to that effect above, to obtain. No book

PERSONAL Case 2471

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No.
72 C 580

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 580

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a

contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application,

> and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out. This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by an Assistant Postmaster . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

AFFIDAVIT OF HERBERT MONTE LEVY

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e., of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing

can happen to a mailer unless and until he violates a Court order. it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

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As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without

any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

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The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back

of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of

the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying

a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is <u>not</u> the one who has either actual or legal custody of the record. On the contrary, "Files relating

to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Moreover, in this particular case, the only document purportedly certified is the Post Office Order purportedly adjucating a violation of the statute. None of the other records annexed to the moving papers have been certified. The existence of the order of the Post Office finding a violation, of course, does not prove a violation in this Court, where defendant is entitled to a trial de novo.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

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In the case at bar, the prohibitory order was not issued by the Postmaster General, nor even by a local postmaster, nor even by an identifiable individual. On the contrary, it was signed by some anonymous individual, signing by initials only, or, if a name was given, where his status was completely undisclosed, even to this time. We know of no statutory or other authority pursuant to which a delegation was made to any such anonymous or virtually anonymous person; if there exists any such delegation, by regulation or toherwise, we are completely unaware of any statutory authority for such delegation. Therefore, the original prohibitory was a complete nullity, and the entire proceeding must fall as being without a foundation, the Government's motion for summary judgment should be denied, and summary judgment should be granted to the defendant.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of R. Gale Harter . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, G. Harter , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

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We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

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We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

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a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued

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against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm

(defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to

determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit

all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equ[illegible]elief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain

false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

But in this case, there is not even any indication whatsoever as to the date of receipt of the second mailing. There is merely, endorsed upon the second alleged mailing envelope, a date, with what purports to be the signature of the addressee. There is simply no way of ascertaining whether this date is supposed to be the date of receipt of the second mailing, or whether it is the date upon which the second alleged mailing envelope was allegedly turned over to the Post Office, written on the envelope for purposes of identification, or indeed, what date it purports to be. Nor, indeed, is there anything to indicate that it was taken immediately to the Post Office. Nor, indeed, is there any reason to suppose that it would be taken immediately to the Post Office, despite whatever crusading zeal the addressee may have felt: There may have been intervals because of vacations, illness, preoccupation with other matters, temporarily mislaying the envelope, inconvenience of post office hours, or a host of different reasons.

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There is no showing whatsoever, and simply no indication whatsoever, of the date of receipt of the second mailing. Therefore, there is no showing whatsoever, of the alleged date of the second mailing, by presumption or otherwise, and summary judgment should be granted to the defendant, since Governmental proof of violation is completely lacking.

There is nothing whatsoever to tie in the return receipt for the alleged complaint with the particular complaint.* Since, by June 30, 1970, according to Vol. III of the Technical Report of The Commission on Obscenity and Pornography, p. 160 the Post Office had issued more than 3,000 complaints, it was extremely easy for the Post Office to have erred administratively, and to have made the error of attaching the wrong return receipt to the complaint. Of course, as Mr. Schwartz admits, he may have made a mistake as well -- we all make mistakes. But there is simply not one scintilla of evidence to show that this particular complaint was ever served upon the defendant. In a department which handled, as well as the complaints referred to some 200,000 orders against defendant and an estimated 750 complaints against it, it would be simply ludicrous to expect

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*Indeed, the return receipt bears the number of a different prohibitory order.

that mistakes have not crept in. But, in any event, in the complete absence of any evidence by affidavit or even by any notation giving the faintest connection between the return receipt and the administrative complaint, there is simply nothing whatsoever here to show that the complaint was ever served, or when it was served.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

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Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Davenport, Iowa , the address to which the first mailing was made, but out of Des Moines, Iowa . We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 1975

HERBERT MONTE LEVY

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
Joseph P. McNerney
Des Moines, Iowa 50318

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 1001

RE: PENT-R BOOKS, INC.,
ads. P.O. (Harter)
P.O. Docket No. R8-DM-57

DATED: August 6, 1969

Client has received the Complaint in the above matter, dated July 23, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionali both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in Pent-R Books, Inc. ads. P.O. (Lincoln), P.O. Docket No. R8-DM-35. We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here are nullities. If either the Order

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the receipt of the Prohibitory Order, the Complaint fails to state a cause of action; there was no foundation for the issuance of the Complaint in the first place. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. The Postmaster in Des Moines does not have jurisdiction over mailings to Davenport.

4. The Order prohibited a mailing to R. Gare Harter, while the second mailing was to G. Harter. Thus, the Order was not violated. Moreover, the original mailing was to G. Harter but the Order did not prohibit a mailing to G Harter.

_____

Herbert Monte Levy

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

August 18, 1969

William Lawrence, Esq.
Assistant General Counsel
Mailability Division
U.S. Post Office Department
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Branning)
P.O. Docket No. BK69-1117-158

Pent-R Books, Inc. ads. P.O. (Harter)
P.O. Docket No. R8-DM-57

Pent-R Books, Inc. ads. P.O. (Winne)
P.O. Docket No. R8-DM-54

Again, please consider this as a notice of appeal from the three decisions of Regional Counsel for the New York Region in the above matters, as well as a brief in support thereof, which hereby incorporates by reference all the points made in my letter to you of August 11, 1969.

Again, these hearing denials are particularly aggravating. For example, in Branning, the demand for hearing was mailed to Brooklyn on the 14th day after its receipt -- and Brooklyn is but a twenty minutes subway ride from my office. In Harter, the complaint was received on July 25th, while the demand for hearing was mailed to the postmaster of Des Moines on August 6th -- only 12 days from the date of its receipt.

I know you must agree with me that no Court would ever countenance a denial of a hearing by the post office on the basis of delays in the mails operated by such post office. I would appreciate it if you could shortly make your ruling on these matters, to avoid the necessity of writing these appeal letters to you.

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

I would appreciate hearing from you as to whether there is any point in my sending you and/or the Postmaster General copies of my demands for hearings.

With kindest personal regards, I am,

Sincerely yours,

Herbert Monte Levy

HML mol

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

LAW OFFICES
OF
HERBERT MONTE LEVY
295 MADISON AVENUE
NEW YORK, N.Y. 10017
(212) 689-2220

November 18, 1969

William Lawrence, Esq.,
Assistant General Counsel
Mailability Division
Post Office Department
Washington,D.C.

Dear Mr.Lawrence:

Re: P.O. Docket Nos. R-11-FWT-90; R10-OK-23; R8-DM-57; 1157; R-14, PD-99; R-14, PD-100; R-14, PD-98; R-14, PD-101; CIN-450; CIN-448; and CIN-449.

Again, please consider this letter as a Notice of Appeal, incorporating all prior arguments in all prior letters, from the Orders in the above entitled matters.

Before going further, I note that I am deeply distressed in that two actions have been commenced against my client, Pent-R Books, Inc., both involving matters on which I had appealed to you, one in my letter of August 11 (Wilcox) and the other of which I had appealed to you on in my letter of September 2nd (Gladden). I simply do not understand how the appeals can still be pending before you in those matters, and a court action brought. If your ruling is that you have no jurisdiction to entertain such appeals, kindly advise me so that I may save the time and effort of taking these appeals. In any event, I am sending a copy of this letter to the U.S. Attorney's Office in Brooklyn, for its information.

In Cannon, I note that the Demand for Hearing was mailed on November 6; client having received the complaint on October 24, only 13 days earlier. Yet the Order was made on November 7th, which was, of course, still within the period when an answer could have been filed. The Order is thus totally illegal.

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

In Strong, the complaint was received on October 23, the Demand for Hearing served on November 5, again 13 days later, and this time the Order was made on November 7, which was the deadline date for "filing".

The Order in Harter, dated August 18, 1969, was received by client on November 14, 1969, and it is again difficult to understand, since in my letter to you of August 18, I had appealed to you from the Hearing Denial in this matter. Similarly, in Mark, I had appealed to you in my letter of August 12 from the Hearing Denial therein, and I am still waiting for action on that appeal.

In the Orders entered in the next four matters, in each case the complaint had been received on October 20, and the Demand for Hearing was sent only 11 days later, on October 31. And, in the last three cases, the complaints were received on October 24, and the Hearing Demands sent out November 6, only 13 days later.

I do not know what is holding up your rulings. I have tried to reach you on the phone several times, but without success. Please do let me hear from you as soon as possible on these matters.

Very truly yours,

Herbert Monte Levy

Herbert Monte Levy

HML/mol

cc: U.S. Attorney's Office
Brooklyn, N.Y.

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
72 C 580

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

AFFIDAVIT OF RICHARD S. SCHWARTZ

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and

capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used,

we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months --

which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus,

although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance.

Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there

are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints, (only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received

from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant

found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which

now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant,

who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different

people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in

that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed,

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R

Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to

have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us?

AFFIDAVIT OF RICHARD S. SCHWARTZ

Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

I understand that according to the purported so called certified file in this case, the purported return receipt for the administrative Post Office complaint is dated However, as noted above, it was our practice and remains our practice to stamp or otherwise indicate on the envelope in which the complaint was contained, the date of its receipt by us. The date of its receipt by us, according to the envelope, which will be annexed hereto, is July 25, 1969, though the date of receipt according to the purported return receipt is July 24, 1969. If we are correct in our date of receipt, then it is patent that the demand for hearing, which our attorney's affidavit indicates was sent on the date it bears, was sent in time, and that we were improperly denied a hearing before the Post Office Department in this case, a default having

AFFIDAVIT OF RICHARD S. SCHWARTZ

been taken without just cause. This raises an issue of fact warranting a trial.

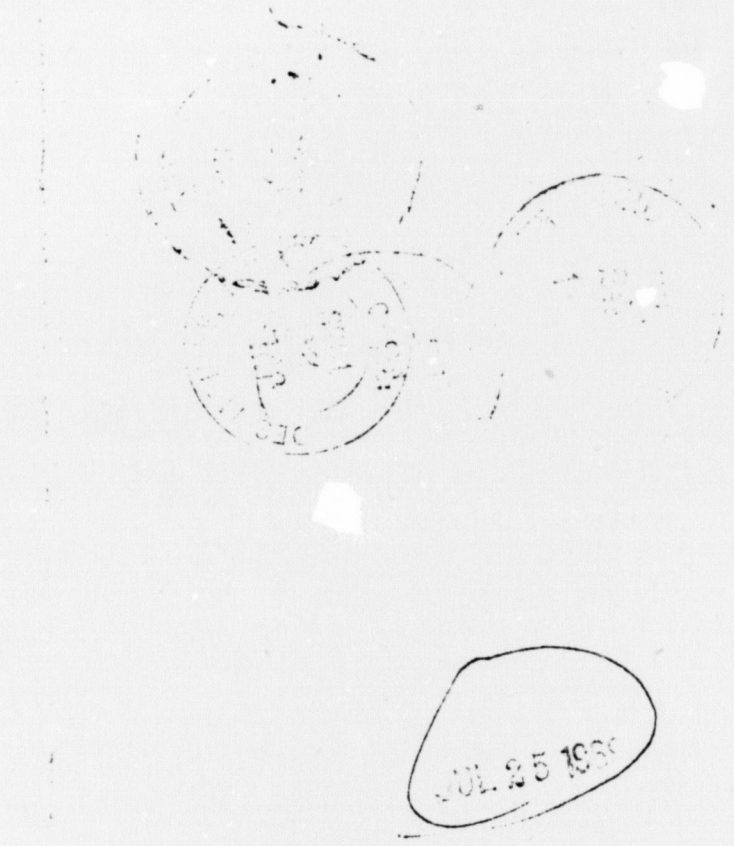
WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismiss ng the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 34-3478
Qualified in Kings County
Commission Expires March 30, 1975

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION.



EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION

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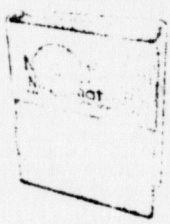
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By Herbert Keppler
Editorial Director & Publisher of Modern Photography



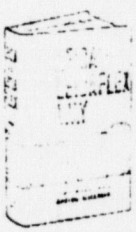
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By L. A. Mannheim

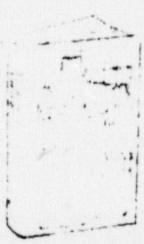


- Latest revised edition
- The only source of data on the full range of Rollei cameras, accessories, materials & techniques
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By H. Freytag



- Latest edition
- 419 pages
- Profusely illustrated in B. & W. & full color
- Includes all latest models, lenses, accessories & older models

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City State Zip

Orders for $10.00 or more shipped postpaid in U.S.A. & Canada. Add 10% for overseas delivery (except APO/FPO). These manuals are also available from your favorite photo dealer or bookstore.

NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer, John Schearer, free-lance photographer; Larry Schiller, film maker, Paul Hue, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ●

MEMORANDUM AND ORDER BY DOOLING, D. J.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ JUL 24 1974 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 580 (HARTER)

MEMORANDUM and ORDER

M'FILMED

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 609, 60 C 1290 and 72 C 588, and what has been said in those dockets need not be repeated here.

Particular to the present case is the narrow point that the certification of the administrative record is inadequate. There are two "certificates." One certifies

that a sheaf of papers attached to it consists of true copies: the copies attached are the familiar round of first-mailing, request for order, order, receipt for order, second mailing, Complaint, and receipt for complaint. A second, later-made certificate, certifies that the attached document is a true copy of a document in Post Office custody, and identifies it as a Postmaster's Order finding mailer in violation of the Prohibitory Order in "P.O. Docket R8-DM-57 (G.Harter)." Attached is a copy of such Order in the familiar printed form.

It is not suggested that the papers furnished under the "certificates" are not true copies, or that they do not correspond with defendant's own records, or that any paper relevant to the case is missing from the sheaf of papers as presented. The Post Office could indeed profit by using a form that adopted the scheme and the clear, complete and succinct language of Rule 44(a)(1). But its failure to have done so is not an answer to a motion for summary judgment. See 28 U.S.C. § 1733(b); cf. Wynne v. United States, 1910, 217 U.S. 234, 246-247; United States v. Merrick, 10th Cir. 1972, 464 F.2d 1087, 1092-1093.

It is, accordingly,

MEMORANDUM AND ORDER BY DOOLING, D. J.

ORDERED that the plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied. A separate judgment form has been approved for the Clerk's entry.

Brooklyn, New York

July 24, 1974.

U. S. D. J.

JUDGMENT.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ JUL 24 1974 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

- -X

72 C 580
(HARTER)

JUDGMENT

ENTERED

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BOOKS, INC., its agents and assigns (1) refrain from any further mailings to R.GALE HARTER (G.HARTER), 1511 East High Street, Davenport, Iowa 52803, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately

abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 24, 1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 581.

DOCKET ENTRIES

U.S.A. v. PENT-R BOOKS INC.

72C 581

DATE	FILINGS PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. Deft srvd 5-25-72.	2
9-27-73	Pltff's notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum ins upport of deft's cross motion for summary judgment filed.	5/6
7-29-74	By DOOLING, J. - Memorandum & order dtd. 7-29-74 granting pltff's motion for summary judgment & denying deft's cross motion filed	
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft to refrain from further mailings to W.J. Walsh etc. filed. Copies to attys	
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	
1-8-75	Scheduling Order #1 from the C of A filed.	X 10

Missing

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

- X

72C [illegible]1

COMPLAINT

Civil Action
No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about April 16, 1969, defendant mailed or caused to be mailed through the U. S. mail to W.J. Walsh, Paramus, New Jersey (hereinafter referred to as "addressee") material offering for sale certain advertisement for Photographic Manual of Sexual Intercouse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

COMPLAINT

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on April 24, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 7207, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about June 28, 1969, in violation of Prohibitory Order No. 7207, defendant, or someone acting on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

COMPLAINT

11. On July 8, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 7207, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or about the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On July 25, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 7207.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 7207, and more specifically, that this Court order and direct defendants, its agents and

assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA, :

Plaintiff, : NOTICE OF MOTION

- against - : 72 C 581

PENT-R-BOOKS, INC., :

Defendant. :

- X

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 4th day of October, 1973, at ~~9:15~~ 10 o'clock in the ~~fore~~noon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment to the

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 6, 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By:

LLOYD H. BAKER
Assistant U. S. Attorney

TO:
HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

426a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

_____ 19 _____

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit:

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

(Signed) Thomas A. Ziebarth

Thomas A. Ziebarth
Acting Assistant General Counsel
Mailability Division

POD
SEAL

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 7207
Issued Against
PKMT-R-BOOKS

P. O. BOX 1555

NEW YORK NY. 10017

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. NK-69-7207-134

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

J Kelley

Postmaster DIR ADM SVCS

FOR JOSEPH J. BENUCCI

NEWARK NEW JERSEY 07102

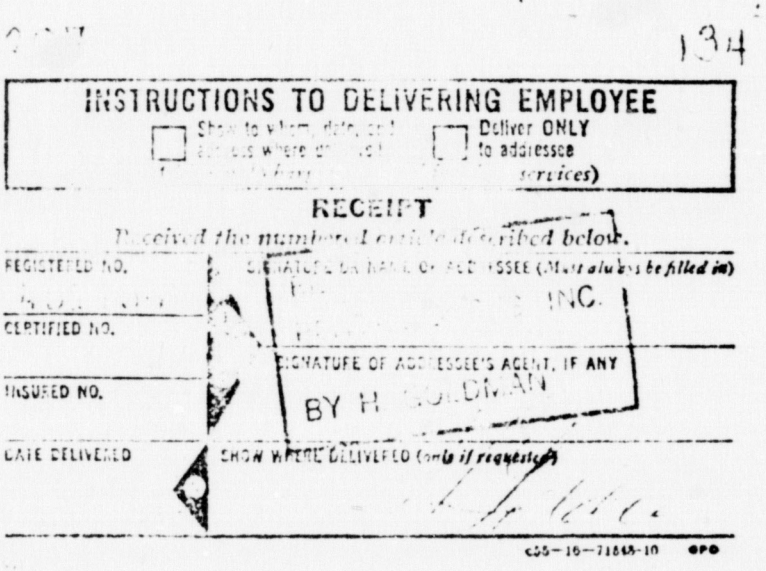
City State ZIP Code

[POSTMARK] JUL 25 1969

Dated:

POD Form 2154
May 1968

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134

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered

☐ Deliver ONLY to addressee

services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

SIGNATURE OF ADDRESSEE (Must always be filled in)

INC.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

BY H GOLDMAN

DATE DELIVERED

SHOW WHERE DELIVERED (only if requested)

C55-16-71645-10 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 7207
Issued Against

RENT-A-BOOKS INC

P. O. BOX 1555

NEW YORK NY 10017
and agents or assigns.

On behalf of:

Mr. W. J. Walsh
Complaining Addressee

P. O. Docket No. NK-69-7207-134

On the 25th day of April, 19 69, you received Prohibitory Order No. 7207, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, _____ (Address), with the undersigned Postmaster, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] JUL 8 1969

Dated: _____

J Kelly
Postmaster
FOR JOSEPH J. DONOVAN

City State ZIP Code

POD Form 2153
May 1968

430a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS U.S. POSTAGE PAID 6c Permit # 9546

FIRST CLASS MAIL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

[illegible] ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilties we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents.

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Mal
Chapter XI ..... Male Technique for Satisfying the Femal
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

TRY IT . . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE ONLY $9.98

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENTER BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

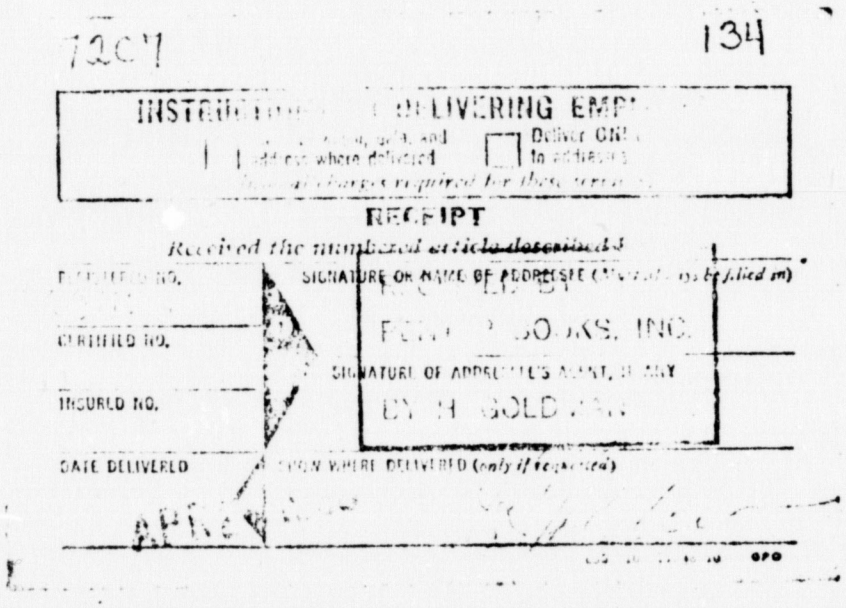
..... signature

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

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12C7

134

INSTRUCTIONS TO DELIVERING EMPLOYEE

1. Show to whom, date, and address where delivered

2. Deliver ONLY to addressee

Show all charges required for these services

RECEIPT

Received the numbered article described below

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

PENN BOOKS, INC.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

BY H GOLD

SHOW WHERE DELIVERED (only if requested)

APR 6

USCO 10-63-10 OPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

[illegible]-R BOOKS, INC.
Mailer

P.O. BOX 1555

NEW YORK, N.Y. 10017
and agents or assigns

PROHIBITORY ORDER

NO. 7207

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Mr. W. J. Walsh 64
(Name of Addressee)

106 Arnot Pl., Paramus, N.J. 07652
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

Mr. W. J. Walsh

ADDRESS: 106 Arnot Place
(Street)

Paramus — N.J. — [illegible] 07652
(City) *(State)* *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

J. Kelly
FOR JOSEPH J. [illegible]
Postmaster

NEWARK — NEW JERSEY — [illegible]
City State ZIP Code

[POSTMARK]

Dated: [illegible] APR 24 1969

POD Form 2152
May 1968

434a

7207

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, W. J. Walsh (Print), addressee [parent of minor addressee] of the enclosed mailing from Pent-R Books, Inc. P. O. Box 81 (Print)
Brooklyn, N.Y. 11223
, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

W. J. Walsh — Signature
4/18/69 — Date
106 Arnot Place — Street
Paramus, N.J. — City
— State
07652 — ZIP Code

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

435a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

WALSH.W.7207

PENT-R BOOKS INC.
P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit # 9546

FIRST CLASS MAIL

7207

MR W J WALSH
[illegible]
AJ [illegible]3652

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

PERSONAL

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

[illegible] ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K., Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

TRY IT . . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE ONLY $9.98

SPECIAL PRE-PUBLICATION OFFER

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENTER BOOKS, INC. P.O. Box 1565
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

..... signature

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No.
72 C 581

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 581

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO)

would be a useless order. As shown by the annexed affidavit of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding

of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required

by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Director of Administrative Services . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an

advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into

Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order. it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed

to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly

determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such

presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest

date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just

who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default

solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be

made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were the purported certification in accordance with the provisions of the Rule, it would be defective for an additional reason, to wit, the fact that the certification completely fails to specify which documents are being certified. The simple fact of the matter is that the certification has not been filled out, and is a completely blank and meaningless certification, reading as follows:

"I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: " -- but these records are never further identified. Hence, it is utterly impossible to tell to what the certification refers. The certification

may refer to the purported records filed in this particular case, or it might be a completely erroneous certification relating to a totally different case. There is no reason to believe one more than the other. In the complete absence of any identification of which documents are being certified, the certification must fall. And in the absence of any proof by affidavit, there is simply no evidence before this Court on this motion for summary judgment, and the Government's motion should be denied, and the complaint dismissed.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General. It was not even issued by a local postmaster. It was issued, on the contrary, by the Director of Administrative Services. We are not aware of any delegation to such an officer

of the power to issue a prohibitory order, and if there was any such delegation of authority, pursuant to any rule or regulation, we are aware of no statute which would authorize such delegation to the Director of Administrative Services.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of Mr. W.J. Walsh . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, Mr. William J. Walsh , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in

the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible,

even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster

or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estination of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions,

and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert

attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced

with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The proof of date of receipt of the second alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply

no signature to even vouch for such a date of receipt -- even by the Post Office.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, neither the complaint nor the order were issued even by a local Postmaster, but were issued by the Director of Administrative Services.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

AFFIDAVIT OF HERBERT MONTE LEVY

Finally, we note that the prohibitory order and the complaint issued out of the Post Office at Paramus, New Jersey , the address to which the first mailing was made, but out of Newark, New Jersey .
We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

GILSOM SAFDEYE
Notary Public, State of New York
No. 34[illegible]478
Qualified in Kings County
Commission Expires March 30, 19[illegible]75

HERBERT MONTE LEVY

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
Joseph J. Benucci
Newark, N. J. 07102

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: Pent-R-Books Inc.
ads. P.O. (Walsh)
P.O. Docket No. NK-69-7207-134

DATED: July 23, 1969

Client has received the Complaint in the above matter, dated July 8, 1969. We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionality both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in Book Bargains Inc. ads. P.O. (Wilber), P.O. Docket No. NK-68-2685-3C We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here ~~is~~ (are) ~~a nullity~~ (nullities). If either the Order or

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the effective date of the Prohibitory Order, the Complaint fails to state a cause of action. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. Nothing was enclosed with the complaint, except for a copy of the Prohibitory Order.

Herbert Monte Levy

EXHIBIT, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

September 2, 1969

William Lawrence, Esq.,
Assistant General Counsel
Post Office Department
Mailability Division
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Gladden)
P.O. Docket No. R8-KC-29

" " ads. P.O. (Kiyak)
P.O. Docket No. NK-69-7339-138

" " " ads. P.O. (Messer)
P.O. Docket No. R5-P-277

" " " ads. P.O. (Sellers)
P.O. Docket No. PH-69-4444-69

" " ads. P.O. (Walsh)
P.O. Docket No. NK-69-7207-134

TRU/ART Distributing Corp. ads P.O. (Daum)
P.O. Docket No. BCS-P-69-24

Again, please consider this as a notice of appeal in each of the above matters for the hearing denials therein, and a brief in support thereof, incorporating my prior arguments by reference.

This time, I am particularly appalled by the hearing denial in Kiyak, where the demand for hearing was mailed to Newark 12 days after receipt of the complaint. This means it took at least four days for the letter to arrive -- I can drive to Newark from my office in 25 minutes.

EXHIBIT, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

I am also somewhat puzzled by the hearing denial in Messer, dated August 20, 1969, inasmuch as an Order had already been made dated August 1st, which I appealed to you in my letter of August 11, 1969.

Can't we clear up all these items?

Sincerely,

Herbert Monte Levy

HML/mol

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #

72 C 581

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint.

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in

publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used,

we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months --

which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus,

although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance.

Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the

prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

---

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

AFFIDAVIT OF RICHARD S. SCHWARTZ

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and

rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols

stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it

and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented

by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different

people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in

that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

(0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to

have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our

system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows: 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

However, in this case, all that was annexed to the complaint was a copy of the prohibitory order.

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived defendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

AFFIDAVIT OF RICHARD S. SCHWARTZ

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 1975

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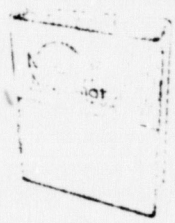
So, please, when you write us about your subscription, be sure to enclose the mailing label from the cover of the magazine—or else copy your name and address exactly as they appear on the mailing label. This will greatly reduce any chance of error, and we will be able to service your request much more quickly.

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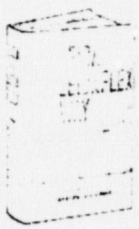
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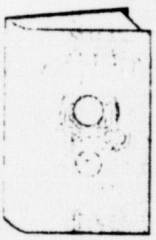
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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer; John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Huc, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ○

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

: 72 C 581

-against- (WALSH)

:

PENT-R-BOOKS, INC., MEMORANDUM

: and

Defendant. ORDER

- -X

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609 , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

MEMORANDUM AND ORDER BY DOOLING, D. J.

was ignored. It was mailed to the Postmaster at Newark, New Jersey, from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the docketed referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 581
(WALSH)
JUDGMENT

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC., its agents and assigns (1) refrain from any further mailing to MR. W. J. WAISH, 105 ARNOT PLACE, PARAMUS, N.J. 07652

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately abstain from any

JUDGMENT

sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 29, 1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 582.

DOCKET ENTRIES

72C 232 U.S.A. v. PENTAGON BOOKS INC.

DATE	FILINGS PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. srvd 5-25-72.	2
9-27-73	Pltff's notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	5/6
7/29/74	By Dooling,J.-Memo & Order dtd 7/29/74 granting pltff's motion for summary judgment, denying deft's cross-motion for same filed	7
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft to refrain from further mailings to Phillip E. Sellers, James C. Biddle Co., Township Lines and Jolly Roads, Plymouth Meeting Pa. 19462 filed.(c/c toa ttys)	8
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PEMET-R BOOKS, INC.,

Defendant.

COMPLAINT

Civil Action No.

- X

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about March 20, 1969, defendant mailed or caused to be mailed through the U. S. mail to P. E. Sellers, Plymouth Meeting, Pennsylvania (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on April 16, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 4444, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about May 26, 1969, in violation of Prohibitory Order No. 4444, defendant, or someone acting

on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On July 1, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 4444, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or abou the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On July 18, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 4444.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

COMPLAINT

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 4444, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

NOTICE OF MOTION

72 C 582

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 5th day of October, 1973, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

an order pursuant to Rule 56 granting summary judgment to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

_____
Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

508a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

September 22, 19 49

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit:

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

(Signed) Thomas A. Ziebarth

Thomas A. Ziebarth
Acting Assistant General Counsel
Mailability Division

POD
SEAL

POD Form 2159
Sep. 1969

509a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 4444
Issued Against
Pent-R Books, Inc.

P. O. Box 1555, Grand Central Station

New York, N. Y. 10017

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. PH-69-4444-69

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

James J. Calogero
Postmaster Officer in Charge

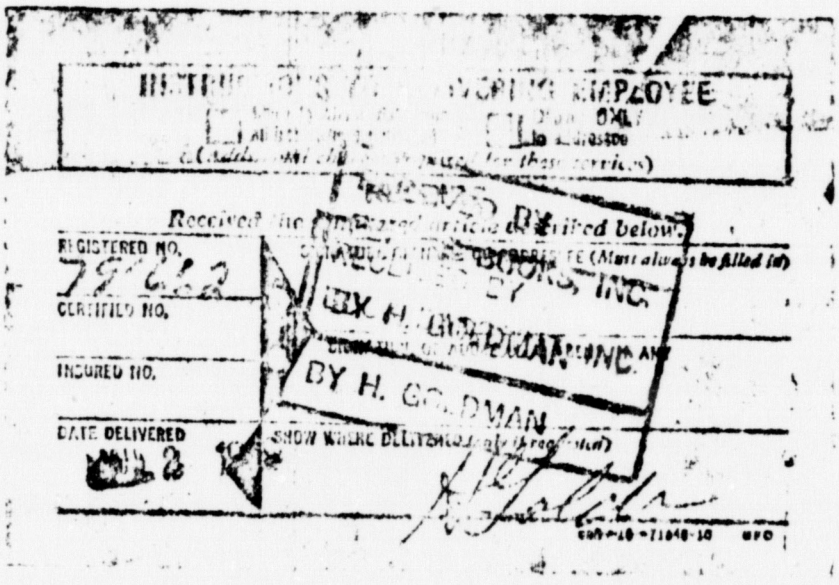
Philadelphia, Pennsylvania 19104
City State ZIP Code

[POSTMARK] PHILADELPHIA PA JUL 18 10 AM

Dated:

POD Form
May 1968 2154

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of Prohibitory Order No. 4444
Issued Against

Pent-R Books, Inc.

P.O. Box 1559, Grand Central Station

New York, N. Y. 10017

and agents or assigns.

On behalf of:

Philip K. Sellers
Complaining Addressee

P. O. Docket No. [illegible]

On the 13th day of April, 1969, you received Prohibitory Order No. 4444, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. ~~You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.~~
3. ~~You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.~~
4. ~~Other (specify).~~

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, ~~in the Office of the Regional Counsel, Post Office Department~~ (Address) with the undersigned Officer in Charge, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] PHILADELPHIA, PA. JUL 1 1969

Dated: [illegible]

~~Postmaster~~ Officer in Charge

Philadelphia, Pennsylvania 19104
City State ZIP Code

POD Form 2153
May 1968

512a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

SPECIAL OFFER - $9.98 (Limited Time Only)

Please check appropriate box!

- ☐ Please ship book and place my name on your mailing list.
- ☐ I am not ordering at this time but place my name on your mailing list.
- ☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

Signature .....

P E SELLERS
J G BIDDLE CO
PLYMOUTH MEETING PA 19462

*You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PLANT BOOKS, INC.
P.O. Box 1055
Grand Central Station
New York, N.Y. 10017

Gentlemen:

Please send me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the First Edition Special price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that if I am not completely satisfied, I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

- ☐ Regular Edition: Handsome Kivar Binding only $9.98
- ☐ Deluxe Edition: Gold-Stamped Casebound Library Volume only $12.98

- ☐ I have enclosed $ ____ ☐ Cash ☐ Check ☐ Money Order
- ☐ I have enclosed a $2 Deposit. Please ship C.O.D.

SAVE MONEY! Enclose full payment and save Postage and C.O.D. fees!!

P.O. BOX 91
BROOKLYN, N.Y. 11223

FIRST CLASS MAIL

PERSONAL

BROOKLYN N.Y.

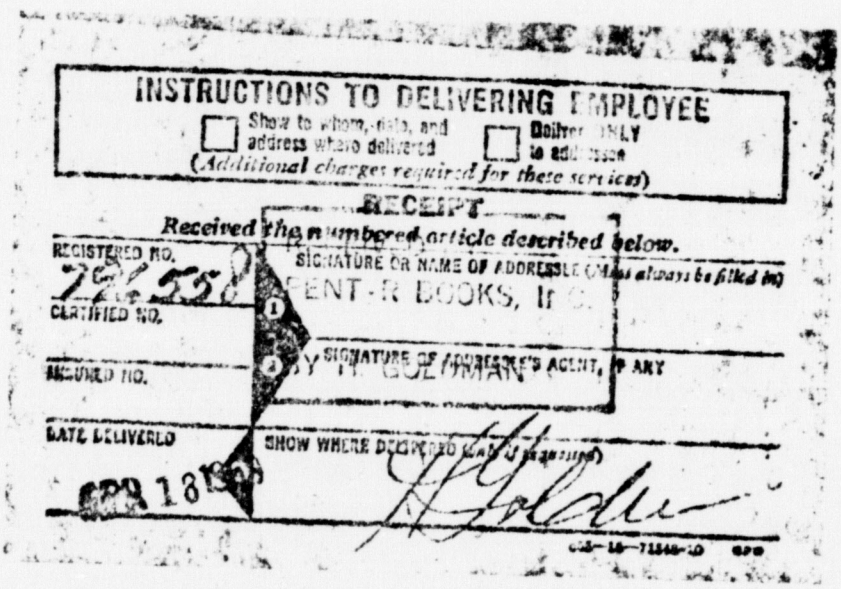
FIRST CLASS POSTAGE PAID

PHILADELPHIA PA. MAY 30 1969

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering FOR SALE to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initial and return it to your mailman. Upon the receipt of this envelope we will immediately remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 72455

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

RENT-R BOOKS, Inc.

CERTIFIED NO.

INSURED NO.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

M. GOLDMAN

DATE DELIVERED

SEP 18 1950

SHOW WHERE DELIVERED (Only if requested)

M. Goldman

GPO 16-71540-2 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

[illegible] Books, Inc.

Mailer

P. O. Box 15[illegible], Grand Central Station

New York, N. Y. 10017

and agents or assigns

PROHIBITORY ORDER

NO. 444

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Phillip A. Sellers

James C. Mobley Co. (Name of Addressee) (four mailings received by the addressee no copies of the envelopes enclosed)

Township Line & Jolly Woods

Plymouth Meeting, Pa. 19462

(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [redacted] residing with him who have not attained their majority.

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

Phillip A. Sellers

ADDRESS: James C. Mobley Co., Township Line & Jolly Woods

(Street)

Plymouth Meeting | Pa. | 19462

(City) (State) (ZIP Code)

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

Dated: APR 16

Postmaster

Philadelphia, Pennsylvania 19101

City State ZIP Code

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

PUBLIC LAW 90-206 **December 16, 1967**

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.".

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, P. E. Sellers
Philip E. Sellers
(Print), addressee [parent of minor addressee] of the enclosed mailing from PENT-R BOOKS, INC., Grand Central
(Print)
Station, New York, N.Y., 10017 (P.O. Box 1555)
, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, § 4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

[signature] 20 March 1969
Signature Date

James G. Biddle Co.
Township Line and Jolly Roads
Plymouth Meeting, Pa. 19462
Street
City State ZIP Code

c/o
Also addressed/Biddle James G. Co., Townshipline, Plymouth, Pa.19462
and James G. Biddle Co., Plymouth Mtg., Pa. 19462

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

517a

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*SPECIAL PRE-PUBLICATION PRICE – ONLY $9.98 (Limited Time Only)

Please check appropriate box:

☐ Please ship book and place my name on your mailing list.
☐ I am not ordering at this time but place my name on your mailing list.
☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

Signature .....

P G SELLERS
JAMES G BIDDLE CO
PLYMOUTH MTG PA 19462

23

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

PENT-R BOOKS

Gentlemen:

Enclosed please find $ .....

[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

PENT-R BOOKS

P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

PROOF OF PAID

FIRST CLASS
PAID
6¢

FIRST CLASS MAIL

OPTIONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ADVERTISING BROCHURE

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE!

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you; this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to soak here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

OUR GUARANTEE

TRY IT . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** will sell for $12.98 and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE! ONLY $9.98

SPECIAL PRE-PUBLICATION LIMITED TIME OFFER

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENTRI BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

..... signature

Print Name. ..... Age. .....

Address. .....

City. ..... State. ..... Zip. .....

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

----------x

NOTICE OF CROSS MOTION.

Docket No.72C 582

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 582

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding

an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required

by statute, but merely a recital that a prima facie case had been made out. This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by an "Officer in Charge" .

We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when

to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the

Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

AFFIDAVIT OF HERBERT MONTE LEVY

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury,

and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

AFFIDAVIT OF HERBERT MONTE LEVY

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

AFFIDAVIT OF HERBERT MONTE LEVY

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

AFFIDAVIT OF HERBERT MONTE LEVY

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on

July 16,* and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted

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*There was apparently an error in this case, since the complaint was received July 2, 1969, while the demand was dated July 1, 1969. My file indicates that my self-imposed deadline for mailing was July 16; the Government should have my mailing envelope, which will show the date of posting, which must have been, in my opinion, July 16, 1969, or earlier.

herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were the purported certification in accordance with the provisions of the Rule, it would be defective for an additional reason, to wit, the fact that the certification completely fails to specify which documents are being certified. The simple fact of the matter is that the certification has not been filled out, and is a completely blank and meaningless certification, reading as follows:

AFFIDAVIT OF HERBERT MONTE LEVY

"I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: " -- but these records are never further identified. Hence, it is utterly impossible to tell to what the certification refers. The certification may refer to the purported records filed in this particular case, or it might be a completely erroneous certification relating to a totally different case. There is no reason to believe one more than the other. In the complete absence of any identification of which documents are being certified, the certification must fall. And in the absence of any proof by affidavit, there is simply no evidence before this Court on this motion for summary judgment, and the Government's motion should be denied, and the complaint dismissed.

Amongst the papers submitted to the Court is what purports to be a return receipt executed by defendant, for the particular prohibitory order involved in this case. However, there is simply nothing whatsoever to tie in that particular return receipt

with the particular prohibitory order. In this connection, it should be noted that this particular defendant has received approximately 200,000 Prohibitory Orders. The Post Office had issued approximately 325,000 Prohibitory Orders by December 31, 1969. Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161. It would thus be the easiest thing in the world for the Post Office to have mixed up a particular prohibitory order with a return receipt for another prohibitory order, or with a return receipt for a complaint, or with a receipt for virtually any communication between the Post Office and the defendant, -- or between others -- and to have annexed that to the prohibitory order as the purported receipt for the particular prohibitory order. In the complete absence of any identification whatsoever of the return receipt being a return receipt for the particular prohibitory order, there is simply no proof whatsoever as to either the receipt of the prohibitory order by the defendant or of the date of such receipt. In the absence of proof as to receipt and/or date of receipt, obviously there can be no finding of a violation of that prohibitory order which would have become effective 30 days from the

date of its receipt. Since there is no showing of the fact of receipt or the date of receipt, it is thus impossible to show what was the effective date of the order, and therefore impossible to show whether or not there had been a violation by a second mailing, assuming at this moment that a second mailing had been made.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the order was issued by a local Postmaster, who had no authority to issue such an order. If indeed there was any administrative regulation authorizing the delegation to a local postmaster of the power to issue a prohibitory order, then, we submit, there is simply no authority in law for such delegation to have been made, where, as here, the statute expressly

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The prohibitory order prohibited a mailing to (possibly among others) a person by the name of Philip E. Sellers . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, P.E. Sellers , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

There is no showing whatsoever, and simply no indication whatsoever, of the date of receipt of the second mailing. Therefore, there is no showing whatsoever, of the alleged date of the second mailing, by presumption or otherwise, and summary judgment should be granted to the defendant, since Governmental proof of violation is completely lacking.

There is nothing whatsoever to tie in the return receipt for the alleged complaint with the particular complaint. Since, by June 30, 1970, according to Vol. III of the Technical Report of The Commission on Obscenity and Pornography, p. 160 the Post Office had issued more than 3,000 complaints, it was extremely easy for the Post Office to have erred administratively, and to have made the error of attaching the wrong return receipt to the complaint. Of course, as

Mr. Schwartz admits, he may have made a mistake as well -- we all make mistakes. But there is simply not one scintilla of evidence to show that this particular complaint was ever served upon the defendant. In a department which handled, as well as the complaints referred to some 200,000 orders against defendant and an estimated 750 complaints against it, it would be simply ludicrous to expect that mistakes have not crept in. But, in any event, in the complete absence of any evidence by affidavit or even by any notation giving the faintest connection between the return receipt and the administrative complaint, there is simply nothing whatsoever here to show that the complaint was ever served, or when it was served.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

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On the contrary, the complaint and order were not even issued by a local Postmaster, but by an "Officer in Charge".

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Plymouth Mtg., Pa. , the address to which the first mailing was made, but out of Philadelphia, Pennsylvania . We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will

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be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3[illegible]
Qualified in [illegible] County
Commission Expires March 30, 19[illegible]

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

DEMAND FOR HEARING, ETC.

TO: ~~xxxxxxxxxx~~ Officer in Charge
James J. Cotoggro
Philadelphia, Pennsylvania 19104

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: Pent-R Books, Inc.
ads. P.O. (Peter E. Sellers)
P.O. Docket No. PH-69-4444-69

DATED: July 1, 1969

Client has received the Complaint in the above matter, dated July 1, 1969. We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionality both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in Pent-R Books, Inc. ads. P.O. (Peter E. Sellers), P.O. Docket No. PH-69-4444-69] We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here (~~xx~~) (are) (~~xxxxxxxxx~~) (nullities). If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the effective date of the Prohibitory Order, the Complaint fails to state a cause of action. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. The Prohibitory Order forbade a mailing to Philip K. Sellers; the alleged second mailing, however, was to Peter E. Sellers. Thus, the Prohibitory Order was not violated.

4. Since the alleged second mailing was refused, the addressee would not have made the necessary documentation as to the contents of the second mailing.

_____

HERBERT MONTE LEVY

LETTER, CONSIDERED AS NOTICE OF APPEAL, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

September 2, 1969

William Lawrence, Esq.,
Assistant General Counsel
Post Office Department
Mailability Division
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Gladden)
P.O. Docket No. R8-KC-29

" " ads. P.O. (Kiyak)
P.O. Docket No. NK-69-7839-138

" " " ads. P.O. (Messer)
P.O. Docket No. R5-P-277

" " " ads. P.O. (Sellers)
P.O. Docket No. PH-69-4444-69

" " ads. P.O. (Walsh)
P.O. Docket No. NK-69-7207-134

TRU/ART Distributing Corp. ads P.O. (Daum)
P.O. Docket No. BOS-P-69-24

Again, please consider this as a notice of appeal in each of the above matters for the hearing denials therein, and a brief in support thereof, incorporating my prior arguments by reference.

This time, I am particularly appalled by the hearing denial in Kiyak, where the demand for hearing was mailed to Newark 12 days after receipt of the complaint. This means it took at least four days for the letter to arrive -- I can drive to Newark from my office in 25 minutes.

LETTER, CONSIDERED AS NOTICE OF APPEAL, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

September 2, 1969

I am also somewhat puzzled by the hearing denial in Messer, dated August 20, 1969, inasmuch as an Order had already been made dated August 1st, which I appealed to you in my letter of August 11, 1969.

Can't we clear up all these items?

Sincerely,

Herbert Monte Levy

HML/mol

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #

72 C 582

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in

publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used,

we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the

equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Actually, our success ratio [illegible] better than the figure of 1/4 of 1% violations -- or [illegible]% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it

was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

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* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes

would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names

on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and out-

standing. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed

is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent

this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

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*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

AFFIDAVIT OF RICHARD S. SCHWARTZ

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue,

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

AFFIDAVIT OF RICHARD S. SCHWARTZ

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its

---

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it

$10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial

questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

AFFIDAVIT OF RICHARD S. SCHWARTZ

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3[illegible]7d
Qualified in Kings County
Commission Expires March 30, 19 75

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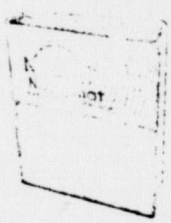
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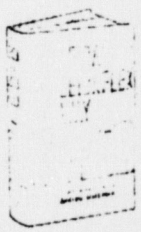
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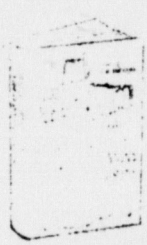


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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer, John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Hue, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image.*

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland.*

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ⊙

AFFIDAVIT OF HYMAN GOLDMAN IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

HYMAN GOLDMAN, being duly sworn, deposes and says that:

I am and at all times from 1968 to date have been employed by PENT-R BOOKS, INC., sued as PENT-R-BOOKS, INC. herein, as a messenger. Accordingly, I was the person who most often went to the Post Office to pick up registered mail, which was held for defendant at the Post Office Registry window. I have been asked to describe the way in which this was handled. I now do so.

AFFIDAVIT OF HYMAN GOLDMAN

When I asked to sign a return receipt, it was not my practice to write down the date on the return receipt on which the material was received. This would usually be written, by stamp or otherwise, by the Post Office employee behind the Registry window. Sometimes this was done while I was waiting, at other times dates were stamped on some receipts after I had signed them, or while I was still signing other receipts. At still other times, the person behind the window would stamp the date of receipt, I assume, after I left, for such person had not stamped the receipts with the date prior to to my leaving.

I did not have an opportunity to always see what material I was getting before I signed for it. On numerous occasions, particularly when a lot of registered mail was received, -- as was the case in 1969 particularly --, I was on many occasions given a batch of return receipts to sign at the same time, or a manifest sheet listing numerous items. Only after I signed them would I then be given the materials that I had supposedly signed for. Thus, on numerous occasions, I had no opportunity whatsoever to check to see whether all of the material for which I signed had been received.

AFFIDAVIT OF HYMAN GOLDMAN

There were of course many opportunitities for errors. Thus, the person behind the window could have put on the wrong date of receipt; I might not have been given a mailing piece for which I signed; I might have been given a mailing piece for which I signed one or more days after the date on which the receipt was supposedly stamped. And the opportunity for errors to be had was aggravated by the fact that, in 1969, there were frequent occasions when I had to sign for between 30 and 50 mailing pieces at the same time.

Thus, the fact that a return receipt bears a particular date does not necessarily prove that it was received by Pent-R Books, Inc. on the date that the return receipt shows.

Hyman Goldman
HYMAN GOLDMAN

Sworn to before me
this 2nd day of November, 1973.

Gilson Stafford

[illegible]

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

- -X

72 C 582
(SELLERS)

MEMORANDUM
and
ORDER

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, and 72 C 609, , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

was ignored. It was mailed to the Postmaster at Philadelphia, Pennsylvania, from New York City, a very few (if any) days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above except the objection that the second mailing was apparently "refused" and, therefore, could not have been found "pandering." Apart from the facts that "refused" does not mean "refused without opening and examining" and that the envelope signalled the content of the mailing the Prohibitory Order and the statute require that there be no second mailing of any kind, whether "pandering" or not.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 582
(SELLERS)
JUDGMENT

- -X

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC. its agents and assigns (1) refrain from any further mailing to PHILIP E. SELLERS, JAMES G. BIDDLE CO., TOWNSHIP LINE and JOLLY ROADS, PLYMOUTH MEETING, PA. 19462,

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its

JUDGMENT

agents or its assigns; and (3) immediately abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 29, 1974.

Approved:

U. S. D. J.

CLERK